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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 296

BORDEN'S FARM PRODUCTS COMPANY, INC., APPELLANT,

vs.

CHARLES H. BALDWIN, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 17, 1934.

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IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. No. 78-91

BORDEN'S FARM PRODUCTS COMPANY, INC., Plaintiff,

against

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, John J. Bennett, Jr., as Attorney General of the State of New York, William C. Dodge, as District Attorney of the County of New York, William F. X. Geoghan, as District Attorney of the County of Kings, Samuel J. Foley, as District Attorney of the County of Bronx, Charles S. Colden, as District Attorney of the County of Queens, and Thomas J. Walsh, as District Attorney of the County of Richmond, Defendants

BILL OF COMPLAINT—Filed April 26, 1934

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, in Equity Sitting:

Borden's Farm Products Company, Inc. brings this its bill of complaint against Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, John J. Bennett, Jr., as Attorney [fol. 2] General of the State of New York, William C. Dodge, as District Attorney of the County of New York, William F. X. Geoghan, as District Attorney of the County of Kings, Samuel J. Foley, as District Attorney of the County of Bronx, Charles S. Colden, as District Attorney of the County of Queens, and Thomas J. Walsh, as District Attorney of the County of Richmond, and respectfully shows unto your Honors, as follows:

First. The plaintiff, Borden's Farm Products Company, Inc., was at all times hereinafter mentioned and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York, a citizen and resident of said State, and a resident of the Southern District of New York.

Second. The defendant, Charles H. Baldwin, is the duly appointed, qualified and acting Commissioner of Agriculture and Markets of the State of New York, and a citizen and resident of said State, and maintains an office for the regular conduct of his duties as such Commissioner in the Southern District of New York.

Third. The defendant, Kenneth F. Fee, is the duly appointed, qualified and acting Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, and a citizen and resident of said State, and maintains an office for the regular conduct of his duties as such Director in the Southern District of New York.

Fourth. The defendant, John J. Bennett, Jr., is the duly elected, qualified and acting Attorney General of the State of New York, and a citizen and resident of said State, and maintains an office for the regular conduct of his duties as such Attorney General in the Southern District of New York.

Fifth. The defendants, William C. Dodge, William F. X. Geoghan, Samuel J. Foley, Charles S. Colden and Thomas J. Walsh, are the duly elected, qualified and acting District Attorneys of the Counties of New York, Kings, Bronx, Queens and Richmond, respectively, and are citizens and [fol. 3] residents of said State. The defendants, William C. Dodge and Samuel J. Foley, as District Attorneys as aforesaid, maintain their respective offices for the regular conduct of their duties as such District Attorneys in the Southern District of New York. The defendants, William F. X. Geoghan, Charles S. Colden and Thomas J. Walsh, as District Attorneys of the Counties of Kings, Queens and Richmond, respectively, maintain offices for the regular conduct of their duties as such District Attorneys in the Eastern District of New York.

Sixth. The ground upon which the jurisdiction of this Court depends is that this suit is one of a civil nature in equity and arises under the Constitution of the United States, as will hereinafter more fully appear. The amount in controversy in this suit exceeds the sum or value of Three thousand dollars ($3,000), exclusive of interest and costs.

Seventh. The plaintiff is engaged and at all times hereinafter mentioned and for many years prior to April 10, 1933, was continuously engaged in the business of purchasing and handling and selling fluid milk and cream and other dairy products in and about the City of New York, State of New York, said City having a population of over one million inhabitants. The plaintiff has built up a large and extensive business in the said City in the sale of fluid milk in bottles under the trade name "Borden's" to consumers and to grocery stores, hotels, restaurants, soda fountains, dairy products stores and similar mercantile establishments (hereinafter collectively referred to as "stores"). The plaintiff operates nine retail stores in the said City at which it has built up a large and extensive business in the sale to consumers of fluid milk in bottles under the plaintiff's said trade name "Borden's".

Eighth. The plaintiff has duly obtained from the Board of Health of the City of New York all such licenses and permits as are required by the Sanitary Code of the said City or the regulations adopted thereunder for the lawful conduct of the plaintiff's said business, and the plaintiff has [fol. 4] duly kept, observed and performed all the provisions of said Sanitary Code and the regulations adopted thereunder. The plaintiff's said business is a lawful one and the pursuit thereof cannot be prohibited directly or indirectly.

Ninth. The plaintiff has expended large sums of money in the advertising of its said trade name "Borden's" and has created and developed a large and valuable trade and good will in connection therewith in the sale of fluid milk in bottles to stores in the City of New York and to consumers generally and at the retail stores operated by the plaintiff in the said City.

Tenth. On or about the 10th day of April, 1933, the Governor of the State of New York approved Chapter 158

of the Laws of 1933 enacted by the Legislature of said State, which said chapter amended the Agriculture and Markets Law, being Chapter 69 of the Consolidated Laws of New York, by adding thereto a new Article 25. A full true and correct copy of said Chapter 158 of the Laws of 1933 is annexed hereto and marked "Exhibit A" and made a part hereof.

Eleventh. In and by the said Article 25 (Exhibit A), a new temporary state agency, known as the Milk Control Board, was created, to continue in existence until March 31, 1934, and was given power until said date to regulate as the emergency required all matters pertaining to the production, manufacture, storage, transportation, disposal, distribution and sale of milk and milk products in the State of New York. It was further provided in and by the said Article 25 that the said Milk Control Board should fix by official order the minimum wholesale and retail prices, and might fix by official order the maximum wholesale and retail prices, to be charged for milk handled within the State of New York for fluid consumption and wheresoever produced, including the wholesale and retail prices to be charged by milk dealers upon the sale of milk to stores either for consumption on the premises or resale to consumers and the prices to be charged by stores to consumers except for consumption on the premises.

[fol. 5] Twelfth. In and by Subsection (c) of Section 317 of the said Article 25 (Exhibit A), it was provided:

(c) It shall not be unlawful for any milk dealer who, at the time this act shall take effect, is engaged in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants, to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed by the board for such sales to stores in such a city."

Thirteenth. On or about the 5th day of May, 1933, the Milk Control Board adopted an order known as Official Order No. 12, a full, true and correct copy of which is an-

nexed hereto and marked "Exhibit B" and made a part hereof. Under and by virtue of the said Official Order No. 12 it was ordered and determined that the phrase "well advertised trade name" in the said Subsection (c) of Section 317 hereinabove set forth in paragraph Twelfth referred to the plaintiff and its trade name "Borden's" (in said order erroneously referred to as "Borden"), among others.

Fourteenth. On or about the 19th day of July, 1933, the Milk Control Board adopted an order known as Official Order No. 35, a full, true and correct copy of which is annexed hereto and marked "Exhibit C" and made a part hereof. Under and by virtue of said Official Order No. 35 the Milk Control Board purported to fix the minimum prices which could be charged in the City of New York on the sale of fluid milk in bottles by milk dealers to stores and the minimum prices which could be charged in said City on the sale of fluid milk in bottles by stores to consumers. In and by paragraph 11 of said Official Order No. 35, it was provided:

"In the City of New York only it shall not be unlawful for any milk dealer who, on April 10. 1933, was engaged in the business of purchasing and handling milk not having a [fol. 6] well advertised trade name to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and the same difference may apply to sales of such milk in such city from stores to consumers."

Fifteenth. On or about the 30th day of January, 1934, the Milk Control Board adopted an order known as Official Order No. 57, a full, true and correct copy of which is annexed hereto and marked "Exhibit D" and made a part hereof. In and by said Official Order No. 57, paragraph 11 of said Official Order No. 35 (Exhibit C) hereinabove set forth in paragraph Fourteenth was amended to read as follows:

"On and after the effective date of this Order the minimum prices specified in Paragraph 4 to be charged by milk dealers to stores and restaurants shall be applicable in all the territory covered by this Order, except in the City of New York. In the City of New York only it shall not be

unlawful for any store to resell to consumers bottled milk at a price not more than 1 cent per quart below the store to consumer price fixed by this Order, provided such milk is purchased from any milk dealer who, on April 10, 1933, was engaged in the business of purchasing and handling milk not having a well advertised trade name."

Sixteenth. On or about the 30th day of March, 1934, the Governor of the State of New York approved Chapter 126 of the Laws of 1934 enacted by the Legislature of said State, which said Chapter amended the said Agriculture and Markets Law by repealing Article 21 and the said Article 25 (Exhibit A) thereof and by adding thereto a new Article 21 and a new Article 21-A. A full, true and correct copy of said Chapter 126 of the Laws of 1934 is annexed hereto and marked "Exhibit E" and made a part hereof.

Seventeenth. It is provided in and by the said Article 21 and Article 21-A (Exhibit E) that the functions, powers and duties of the Milk Control Board created by the said Article 25 (Exhibit A), except as modified in and by the said Article 21 and Article 21-A (Exhibit E), shall be exercised and performed by a division in the Department [fol. 7] of Agriculture and Markets to be known as the Division of Milk Control. It is further provided that the Department of Agriculture and Markets through the Commissioner of Agriculture and Markets shall be vested with the powers theretofore conferred upon the Milk Control Board by the said Article 25 (Exhibit A), and that the said Commissioner may adopt and enforce all rules and all orders necessary to carry out the provisions of the said Article 21 and Article 21-A (Exhibit E).

Eighteenth. In and by Section 258-m of the said Article 21-A (Exhibit E), it is provided:

"§ 258-m. Orders fixing prices and handling charges for milk. The commissioner shall investigate what are reasonable costs and charges for producing, hauling, handling, processing and/or other services performed in respect to milk, and what prices for milk in the several localities and markets of the state, and under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, and be most in the public interest.

The commissioner shall take into consideration the balance between production and consumption of milk, the costs of production and distribution, and the purchasing power of the public.

"1. The commissioner, after making such investigations, may fix by official order:

* * * * * * *

"(b) The minimum and/or maximum wholesale or retail prices to be charged for milk handled within the state for fluid consumption and wheresoever produced, when sold by milk dealers to consumers; by milk dealers to stores either for consumption on the premises or resale to consumers; by stores to consumers except for consumption on the premises where sold; by milk dealers to other milk dealers. A minimum wholesale or retail price to be charged for milk shall not be fixed higher than is necessary to cover the costs of ordinarily efficient and economical milk dealers, including a reasonable return upon necessary investment. The fact that some dealers selling milk not having a well advertised trade name to stores in a city of more than one million inhabitants avail themselves of the privilege of [fol. 8] making such sales at less than the minimum price shall not require fixing of the price higher than would otherwise be necessary."

Nineteenth. In and by Section 258-q of the said Article 21-A (Exhibit E), it is provided:

"It shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-three has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city."

Twentieth. In and by Section 258-i of said Article 21 (Exhibit E), it is provided that the rules and orders of the

Milk Control Board in effect at the time of the transfer to the Division of Milk Control of the powers, duties and functions theretofore vested in the Milk Control Board or the Commissioner of Agriculture and Markets shall remain in full force and effect until otherwise provided by the said Commissioner.

Twenty-first. On or about the 4th day of April, 1934, the defendant, Charles H. Baldwin, as the Commissioner of Agriculture and Markets, adopted an order known as Official Order No. 59, a full, true and correct copy of which is annexed hereto and marked "Exhibit F" and made a part hereof. In and by said Official Order No. 59, Official Order No. 57 (Exhibit D) of the Milk Control Board hereinabove set forth in paragraph Fifteenth was annulled.

Twenty-second. The said Official Order No. 12 (Exhibit B), the said Official Order No. 59 (Exhibit F) and the said Official Order No. 35 (Exhibit C), as amended by the said Official Order No. 59, are deemed by the defendants to be in full force and effect.

[fol. 9] Twenty-third. There are in the City of New York numerous persons, firms, corporations and associations engaged in the business of selling to stores fluid milk in bottles with whom the plaintiff is in direct and active competition who are not referred to in the said Official Order No. 12 (Exhibit B) and to whom the defendant, Charles H. Baldwin, as Commissioner of Agriculture and Markets, has determined that the phrase "well advertised trade name" in Subsection (c) of Section 317 of the said Article 21-A (Exhibit E) hereinabove set forth in paragraph Twelfth does not refer. Under and by virtue of the said Article 21 and Article 21-A (Exhibit E), and the said Official Orders No. 12 (Exhibit B), No. 59 (Exhibit F) and No. 35 (Exhibit C) as amended by said Official Order No. 59 (a) the said persons, firms, corporations and associations are and will be authorized and permitted to sell to stores in the City of New York fluid milk in bottles at a price one cent per quart below the minimum price at which the plaintiff is and will be authorized or permitted to sell to stores in the said City its fluid milk in bottles under its trade name "Borden's", and (b) stores in the said City are and will be authorized and permitted to purchase from said

persons, firms, corporations and associations fluid milk in bottles at a price one cent per quart below the minimum price at which stores in the said City are and will be authorized or permitted to purchase plaintiff's fluid milk in bottles under its trade name "Borden's"; and stores in the said City are and will be authorized and permitted to sell to consumers fluid milk in bottles of the said persons, firms, corporations and associations at a price one cent per quart below the minimum price at which such stores are permitted to sell to consumers the plaintiff's fluid milk in bottles under its trade name "Borden's"; and the plaintiff is and will continue to be deprived thereby of a large part of the market for its milk, and the value of its business, property and good will is and will be seriously impaired and injured, to the immediate and irreparable damage of the plaintiff.

Twenty-fourth. The said Article 21 and Article 21-A (Exhibit E) and the said Official Orders No. 12 (Exhibit B), No. 59 (Exhibit F), and No. 35 (Exhibit C) as amended by [fol. 10] said Official Order No. 59, in so far as the said Articles and Orders (1) prohibit or restrain the plaintiff from selling to stores in the City of New York its fluid milk in bottles under its trade name "Borden's" at a price as low as that at which any other person, firm, corporation or association is authorized or permitted to sell to stores in the said City fluid milk in bottles, or (2) prohibit or restrain stores in the said City from purchasing from the plaintiff its fluid milk in bottles under its trade name "Borden's" at a price as low as that at which such stores are authorized or permitted to purchase fluid milk in bottles from any other person, firm, corporation or association, or (3) prohibit or restrain stores in the said City from selling to consumers the plaintiff's fluid milk in bottles under its trade name "Borden's" at a price as low as that at which such stores are authorized or permitted to sell to consumers fluid milk in bottles of any other person, firm, corporation or association, are arbitrary, unreasonable, oppressive and discriminatory and have no relation to the protection of the public health or the public welfare or to any of the objects or purposes for which the said Article 21 and Article 21-A were enacted, and, as the plaintiff is informed by its counsel and believes and therefore alleges, the said Article 21 and Article 21-A and the

said Official Orders No. 12 (Exhibit B), No. 59 (Exhibit F) and No. 35 (Exhibit C) as amended by the said Official Order No. 59, are in violation of the Fourteenth Amendment to the Constitution of the United States in that they deprive the plaintiff of its property without due process of law and in that they deny the plaintiff the equal protection of the laws.

Twenty-fifth. In and by Section 257 of the said Article 21 (Exhibit E), it is provided that no milk dealer (said term being defined in Section 253 of the said Article to include any person who purchases or handles milk, other than a hotel or restaurant which sells only milk consumed on the premises where sold or a producer who delivers milk only to a milk dealer) shall buy or sell or distribute milk unless such dealer be licensed as provided in said Article 21. It is further provided in and by Section 258 of said Article 21 that every milk dealer shall file on or before [fol. 11] April 30, 1934, an application for the license so required to be obtained upon a blank prepared under authority of the Commissioner of Agriculture and Markets. It is further provided in and by Section 258-c of said Article 21 that the said Commissioner may refuse to grant a license or may revoke a license already granted when he is satisfied of the existence of any of the reasons set forth in said Section 258-c. It is further provided in and by Section 258-e of said Article 21 that the said Commissioner may institute such action at law or in equity as may appear necessary to enforce compliance with any provision of the statutes, rules and orders committed to his administration and in addition to any other remedy under Article 3 of the said Agriculture and Markets Law or otherwise may apply for relief by injunction.

Twenty-sixth. The defendant, Charles H. Baldwin, as Commissioner of Agriculture and Markets, requires as a prerequisite to the granting of the licenses required to be obtained by the plaintiff as a milk dealer pursuant to the provisions of Section 258 of the said Article 21 (Exhibit E), that the plaintiff shall agree in writing to comply with and obey the provisions of said Agriculture and Markets Law and the rules and orders promulgated by the said Commissioner. Unless such an agreement is made by the plaintiff, the Commissioner will not grant such licenses to it.

Twenty-seventh. In and by Sections 38, 39 and 40 of the said Agriculture and Markets Law (a full, true and correct copy of which Sections is annexed hereto and marked "Exhibit G" and made a part hereof) it is provided that every person, firm, corporation or association who shall, by himself, itself or through his ~~or its~~ agents, officers and employees, violate any of the provisions of said law or of any other law the enforcement of which is within the jurisdiction of the Department of Agriculture and Markets, or who shall fail to obey any order of the Commissioner of Agriculture and Markets, or who shall violate any rule of the said Department, shall be subject to certain money penalties in the said Sections more particularly set forth, and that in an action for the recovery of any such penalty or [fol. 12] forfeiture for the violation of such law or of such rule an application may be made on the part of the people for an injunction to restrain the defendant, his agents and employees, from the further violation thereof.

Twenty-eighth. In and by Section 41 of the said Agriculture and Markets Law (a full, true and correct copy of which Section is annexed hereto and marked "Exhibit H" and made a part hereof), it is provided that the violation of any of the provisions of the said Agriculture and Markets law constitutes a misdemeanor, punishable by fine or imprisonment, or both.

Twenty-ninth. Under and by virtue of the said Article 21 and Article 21-A (Exhibit E) the defendant, Charles H. Baldwin, as Commissioner of Agriculture and Markets, and the defendant, Kenneth F. Free, as Director of the Division of Milk Control of the Department of Agriculture and Markets, are charged with the duty of enforcing the provisions of the said Article 21 and Article 21-A and the said Official Orders No. 12 (Exhibit B), No. 59 (Exhibit F) and No. 35 (Exhibit C) as amended by said Official Order No. 59.

(a) The said defendants, in their said official capacities, have notified the plaintiff that they will refuse to grant to the plaintiff the licenses which the plaintiff is required to obtain pursuant to the said Article 21, unless the plaintiff shall agree in writing to comply with and obey the provisions of the said Argiculture and Markets Law and the rules and orders promulgated by the said Commissioner

and, in particular, unless the plaintiff shall agree in writing to sell to stores in the City of New York, and from its stores in the said City to consumers, its fluid milk in bottles under its trade name "Borden's" at a price not less than the minimum price provided for in applicable orders promulgated from time to time by the said Commissioner, although other persons, firms, corporations and associations which are competitors of the plaintiff are permitted to make sales of fluid milk in bottles to stores in the said City at a price [fol. 13] one cent per quart less than the minimum so imposed upon the plaintiff by such orders.

(b) The said defendants, in their said official capacities, have threatened to invoke against the plaintiff the remedies provided in the said Agriculture and Markets Law if the plaintiff shall, without having first obtained the required licenses, continue on or after May 1, 1934, its business as a milk dealer.

(c) The said defendants, in their said official capacities, have threatened to invoke against the plaintiff the remedies provided in the said Agriculture and Markets Law if the plaintiff shall sell or attempt to sell to stores in the City of New York, or from its stores in the said City to consumers, its fluid milk in bottles under its trade name "Borden's" at a price less than the minimum price fixed in applicable orders promulgated from time to time by the said Commissioner, although other persons, firms, corporations and associations which are competitors of the plaintiff are permitted to make sales of fluid milk in bottles at a price one cent per quart less than the minimum so imposed upon the plaintiff by such orders.

Thirtieth. Under and by virtue of the said Agriculture and Markets Law the defendant, John J. Bennett, Jr., as Attorney General of the State of New York is charged with the duty of causing an action or proceedings to be brought in the name of the people for the recovery of any penalty or forfeiture incurred under the provisions of Sections 39 and 40 of said Law (Exhibit G).

(a) The said defendant, in his said official capacity, has threatened to cause an action or proceeding to be brought for the recovery of the penalties specified in said Sections 39 and 40 if the plaintiff shall, without having first obtained

the required licenses, continue on or after May 1, 1934 its business as a milk dealer.

(b) The said defendant, in his said official capacity has threatened to cause an action or proceeding to be brought for the recovery of the penalties specified in said Sections [fol. 14] 39 and 40 if the plaintiff shall sell or attempt to sell to stores in the City of New York, or from its stores in the said City to consumers, its fluid milk in bottles under its trade name "Borden's" at a price less than the minimum price fixed in applicable orders promulgated from time to time by the Commissioner of Agriculture and Markets, although other persons, firms, corporations and associations which are competitors of the plaintiff are permitted to make sales of fluid milk in bottles at price one cent per quart less than the minimum so imposed upon the plaintiff by such orders.

Thirty-first. Under and by virtue of the said Agriculture and Markets Law and other applicable statutes of the State of New York, the defendants, William C. Dodge, William F. X. Geoghan, Samuel J. Foley, Charles S. Colden and Thomas J. Walsh, as District Attorneys of the Counties of New York, Kings, Bronx, Queens and Richmond, respectively, are charged with the duty of prosecuting any person or corporation guilty of a violation of Section 41 of the said Agriculture and Markets Law (Exhibit H).

(a) The said defendants, in their said official capacities, may institute criminal proceedings against the plaintiff if the plaintiff shall, without first having obtained the required licenses, continue on or after May 1, 1934 its business as a milk dealer.

(b) The said defendants, in their said official capacities, may institute criminal proceedings against the plaintiff if it shall sell or attempt to sell to stores in the City of New York, or from its stores in the said City to consumers, its fluid milk in bottles under its trade name "Borden's" at a price less than the minimum price fixed in applicable orders promulgated from time to time by the Commissioner of Agriculture and Markets, although other persons, firms, corporations and associations which are competitors of the plaintiff are permitted to make sales of fluid milk in bottles at a price one cent per quart less than

the minimum so imposed upon the plaintiff by such orders.

[fol. 15] Thirty-second. The penalties attached to the violation of the said Article 21 and Article 21-A (Exhibit E) and the said Official Orders No. 12 (Exhibit B), No. 59 (Exhibit F) and No. 35 (Exhibit C), as amended by said Official Order No. 59, are so great that (a) the plaintiff may not sell to stores in the City of New York its fluid milk in bottles under its trade name "Borden's" at a price as low as that at which other persons, firms, corporations and associations are and will be authorized and permitted to sell to stores in the said City fluid milk in bottles; and (b) stores in the said City may not purchase from the plaintiff the plaintiff's fluid milk in bottles under its trade name "Borden's" at a price as low as that at which such stores are and will be authorized and permitted to purchase from other persons, firms, corporations and associations fluid milk in bottles; and (c) stores in the said City may not sell to consumers the plaintiff's fluid milk in bottles under its trade name "Borden's" at a price as low as that at which such stores are and will be authorized and permitted to sell to consumers fluid milk in bottles of other persons, firms, corporations and associations; even for the purpose of testing the constitutionality and validity of the said Articles and of the said Official Orders, and unless this court shall determine the validity of the said Articles and the said Official Orders in this proceeding the plaintiff, its officers, agents and employees will be compelled to submit to the said Articles and the said Official Orders, whether the same be valid or invalid, and the plaintiff will thereby be deprived of its property without due process of law and will be denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Thirty-third. By reason of the said Articles and the said Official Orders the plaintiff's market for the sale to stores in the City of New York of its fluid milk in bottles under its trade name "Borden's" is and will be impaired to the extent of at least 25,000 quarts daily. The plaintiff is now suffering, and will suffer each day that the said impairment continues, immediate and irreparable injury, loss and damage for which it has and can have no recourse.

[fol. 16] Thirty-fourth. The plaintiff has no adequate remedy at law and is relievable only in a court of equity.

Wherefore, and inasmuch as the plaintiff can have adequate relief only in a court of equity, the plaintiff prays:

1. That an injunction issue, temporary until hearing and perpetual thereafter, enjoining and restraining the defendants, Charles H. Baldwin as Commissioner of Agriculture and Markets and Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets, John J. Bennett, Jr., as Attorney General, and William C. Dodge, William F. X. Geoghan, Samuel J. Foley, Charles S. Colden and Thomas J. Walsh as District Attorneys of the Counties of New York, Kings, Bronx, Queens and Richmond, respectively, and each of them, from bringing or prosecuting or attempting to bring or to prosecute directly or indirectly, or causing to be brought or prosecuted, directly or indirectly, any action, suit or proceeding at law or in equity or any criminal action or proceeding:

(a) Against the plaintiff, or any of the officers, agents or employees thereof by reason of the plaintiff selling or attempting to sell to stores in the City of New York, or from its stores in the said City to consumers, its fluid milk in bottles under its trade name "Borden's" at a price less than the minimum price for such sales fixed or which may be fixed from time to time by the said Commissioner but not less than the lowest price at which any other person, firm, corporation or association is or may be authorized or permitted to sell fluid milk in bottles to stores or from stores to consumers, as the case may be, in said City;

(b) Against any other person, firm, corporation or association in the City of New York or any of the officers, agents or employees thereof, or from revoking any license required by Article 21 of the said Agriculture and Markets Law to be obtained and held by any such person, firm, corporation or association, by reason of such person, firm, corporation or association purchasing from the plaintiff, or selling to consumers in said City, plaintiff's fluid milk [fol. 17] in bottles under its trade name "Borden's" at a price less than the minimum price for such sales fixed or which may be fixed from time to time by the said Commissioner but not less than the lowest price at which such person, firm, corporation or association is or may be authorized or permitted to purchase or to sell to consumers, as

the case may be, the fluid milk of any other person, firm, corporation or association in bottles in said City.

(c) Against the plaintiff or any officer, agent or employee thereof by reason of the plaintiff continuing on or after May 1, 1934, its business as a milk dealer without having first obtained the licenses required by Article 21 of the said Agriculture and Markets Law or against any other person, firm, corporation or association or any officer, agent or employee thereof or from revoking any license required by said Article 21 to be obtained and held by any such person, firm, corporation or association by reason of such person, firm, corporation or association purchasing milk from or selling milk to the plaintiff or in any way dealing in or handling milk of the plaintiff although the plaintiff shall not have obtained the licenses required by Article 21 of the said Agriculture and Markets Law; provided, however, that the plaintiff shall not have taken any action or omitted to take any action constituting grounds for refusal or revocation of the license provided for by Article 21 of said Agriculture and Markets Law other than (a) by refusing to agree in writing on or before April 30, 1934, to comply with and obey the provisions of the said Agriculture and Markets Law and the rules and orders promulgated by the said Commissioner, and in particular by refusing to agree in writing on or before said date to sell to stores in the City of New York, and from its stores in the said City to consumers, its fluid milk in bottles under its trade name "Borden's" at a price not less than the minimum price fixed in applicable orders promulgated from time to time by the said Commissioner, or (b) by the sale to stores in the City of New York or from its stores in the said City to consumers, [fol. 18] of its fluid milk in bottles under its trade name "Borden's" at a price less than the minimum price for such sales fixed or which may be fixed from time to time by the said Commissioner but not less than the lowest price at which any other person, firm, corporation or association is or may be authorized or permitted to sell fluid milk in bottles to stores or from stores to consumers, as the case may be, in said City.

2. That the said Article 21 and Article 21-A and the said Official Orders in so far as the said Articles and Official Orders (1) prohibit or restrain the plaintiff from selling to stores in the City of New York its fluid milk in bottles under

its trade name "Borden's" at a price as low as that at which any other person, firm, corporation or association is authorized and permitted to sell to stores in the said City fluid milk in bottles, or (2) prohibit or restrain stores in the said City from purchasing from the plaintiff its fluid milk in bottles under its trade name "Borden's" at a price as low as that at which such stores are authorized and permitted to purchase fluid milk in bottles from any other person, firm, corporation or association, or (3) prohibit or restrain stores in the said City and the retail stores operated by the plaintiff in the said City from selling to consumers the plaintiff's fluid milk in bottles under its trade name "Borden's" at a price as low as that at which such stores are authorized and permitted to sell to consumers fluid milk in bottles of any other person, firm, corporation or association, be declared to be unconstitutional, illegal and void in that they violate the Fourteenth Amendment to the Constitution of the United States by depriving plaintiff of its property without due process of law and by depriving plaintiff of the equal protection of the laws, and that an injunction issue, temporary until hearing and perpetual thereafter, enjoining and restraining the enforcement of the said Articles and Official Orders as hereinabove prayed for.

3. That the plaintiff may have such other and further relief in the premises as the nature of the case may require and as may be in accordance with equity.

[fol. 19] That a writ or writs of subpoena be directed to the said defendants, Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, John J. Bennett, Jr., as Attorney General of the State of New York, and William C. Dodge, William F. X. Geoghan, Samuel J. Foley, Charles S. Colden and Thomas J. Walsh as District Attorneys of the Counties of New York, Kings, Bronx, Queens and Richmond, respectively, commanding them, and each of them, at a certain time and under a certain penalty therein to be named, to be and appear before this Honorable Court then and there sev-

erally to answer all and singular the matters aforesaid, but not under oath, answer under oath being hereby expressly waived, and to abide by and perform such other and further orders or decrees as to the Court shall seem meet.

Milbank, Tweed, Hope & Webb, 15 Broad Street, New York, N. Y., Solicitors for Plaintiff. Timothy N. Pfeiffer, of Counsel.

[fol. 20] *Duly sworn to by John F. Watson. Jurat omitted in printing.*

[fol. 21] EXHIBIT "A" TO COMPLAINT.

Chapter 158

An Act to amend the agriculture and markets law, in relation to milk control during the existing emergency, creating the milk control board and defining its jurisdiction, powers and duties.

Became a law April 19, 1933, with the approval of the Governor. Passed, on message of necessity, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article twenty-five of chapter forty-eight of the laws of nineteen hundred twenty-two re-entitled by chapter two hundred and seven of the laws of nineteen hundred twenty-seven, "An act in relation to agriculture and markets, constituting chapter sixty-nine of the consolidated laws," comprising sections two hundred and ninety-two to two hundred and ninety-seven, both inclusive, is hereby renumbered article twenty-six, and such sections are hereby renumbered sections three hundred and fifty to three hundred and fifty-five, respectively, and such chapter is hereby amended by adding a new article, to be article twenty-five, to read as follows:

Article 25

Milk Control

Section 300. Legislative finding; statement of policy.
301. Definitions.
302. Milk control board.
303. General powers.
304. Rules and orders.
305. Investigation.*
306. Entry and inspection.
307. Violations; remedies.
308. Licenses to milk dealers; suspension; revocation; review.
309. Records.
310. Reports.
311. Report of receipts.
312. Order fixing price of milk.
313. Legislative intent.

[fol. 22]

314. Interstate and federal compacts.
315. Reports to governor and legislature.
316. Partial invalidity.
317. Construction, exceptions and limitations.
318. Saving clause.
319. Duration of board.

§ 300. Legislative finding; statement of policy. This article is enacted in the exercise of the police power of the state, and its purposes generally are to protect the public health and public welfare. It is hereby declared that unhealthful, unfair, unjust, destructive, demoralizing and uneconomic trade practices have been and are now carried on in the production, sale and distribution of milk and milk products in this state, whereby the dairy industry in the state and the constant supply of pure milk to inhabitants of the state are imperiled. That such conditions constitute a menace to the health, welfare and reasonable comfort of the inhabitants of the state. That in order to protect the well-being of our citizens and promote the public welfare, and in order to preserve the strength and vigor of the race, the production, transportation, manufacture, storage, dis-

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*So in original. [Does not conform to section heading.]

tribution and sale of milk in the state of New York is hereby declared to be a business affecting the public health and interest. That the production and distribution of milk is a paramount industry upon which the prosperity of the state in large measure depends. That the present acute economic emergency, being in part the consequence of a severe and increasing disparity between the prices of milk and other commodities, which disparity has largely destroyed the purchasing power of milk producers for industrial products, has broken down the orderly production and marketing of milk and has seriously impaired the agricultural assets supporting the credit structure of the state and its local governmental subdivisions. That the danger to the public health and welfare is immediate and impending, the necessity urgent and such as will not admit of delay in public supervision and control in accord with proper standards of production, sanitation and marketing. The foregoing statements of fact, policy and application of this article are hereby declared as a matter of legislative determination.

§ 301. Definitions. As used in this article, unless otherwise expressly stated, or unless the context or subject matter otherwise requires:

"Commissioner" means the commissioner of agriculture and markets.

[fol. 23] "Board" means the temporary state agency created by this article, to be known as the "Milk control board."

"Director" means the director of the milk control board.

"Person" means any person, firm, corporation or association.

"Milk dealer" means any person who purchases or handles milk within the state, for sale in this state, or sells milk within the state except when consumed on the premises where sold. Each corporation which if a natural person would be a milk dealer within the meaning of this article, and any subsidiary of such corporation, shall be deemed a milk dealer within the meaning of this definition. A producer who delivers milk only to a milk dealer shall not be deemed a milk dealer.

"Market" means any city, town or village of the state, or two or more cities and/or towns and/or villages and sur-

rounding territory designated by the board as a natural marketing area.

"Licensee" means a licensed milk dealer.

"Milk" means liquid milk and/or cream fresh, sour or storage; and/or condensed or concentrated whole milk, except when contained in hermetically sealed cans. In each instance where quantity is referred to the intent is to include its whole milk equivalent.

"Producer" means a person producing milk within the state of New York.

"Consumer" means any person other than a milk dealer who purchases milk for fluid consumption.

"Store" means a grocery store, hotel, restaurant, soda fountain, dairy products store and similar mercantile establishment.

§ 302. Milk control board. There shall be in the department of agriculture and markets a milk control board, to consist of the commissioner of agriculture and markets, the commissioner of health, and the director of the milk control board. The commissioner of agriculture and markets and the commissioner of health shall receive no additional compensation for services rendered pursuant to this article, but shall be allowed their actual and necessary expenses incurred in the performance of their duties under this article. The director shall be appointed by the governor and serve during his pleasure. The director shall receive a compensation to be fixed by the governor within the amount available by appropriation. Technical, legal and other services for such board shall be performed, so far as practicable, by forces or officers in the department of agriculture [fol. 24] and markets and by forces or officers in the department of health, without additional compensation, but the commissioner may appoint and at pleasure remove such additional technical, legal and other assistants and employees as may be necessary to carry out the provisions of this article, prescribe their powers and duties, and fix their compensation within the amount available by appropriation. The director and the additional technical, legal and other assistants and employees appointed by the board, shall be exempt from civil service examination and the provisions of the civil service law and rules. The commissioner of agriculture and markets shall be the administrative head of the board. Each member of the board shall

execute and file with the comptroller a bond conditioned for the safe-keeping and lawful application of moneys coming to the board and under his control in such amount as may be approved by the head of the department of taxation and finance. The commissioner shall, subject to the limitations of this article and of law, enforce the provisions of this article, but no official act shall be taken, rule or regulation promulgated, or official order made or enforced, with respect to the provisions of this article, without the approval of a majority of the members of the board. The commissioner of agriculture and markets may by official order filed in the office of the department of agriculture and markets designate a deputy, assistant or other subordinate in the department of agriculture and markets, to perform the duties of the commissioner, and the commissioner of health by official order filed in the office of the department of health may designate a deputy, assistant or other subordinate in the department of health to perform the duties of the commissioner of health under this article. The person, if any, designated pursuant to this section, shall have the powers and be subject to the duties and responsibilities of the officer appointing him. Such designation shall be deemed temporary only and shall not affect the civil service or retirement rights of the person designated. The persons so designated shall not receive any additional compensation for the services performed, but shall be allowed their actual and necessary traveling and other expenses incurred in the performance of their duties under this article. The principal office of the board shall be in the city of Albany, in rooms assigned by the superintendent of public buildings, but offices in other localities may be maintained by the board.

§ 303. General powers. The board is hereby declared to be the instrumentality of the state for the purpose of attaining the ends recited in the legislative finding, statement [fol. 25] of policy and application of article, and is hereby vested with power.

(a) To supervise and regulate the entire milk industry of New York state, including the production, transportation, manufacture, storage, distribution, delivery and sale of milk and milk products in the state of New York; provided, however, that nothing contained in this article shall be construed to abrogate or affect the status, force or oper-

ation of any provision of the public health law, the public service law, the state sanitary code or any local health ordinance or regulation.

(b) To investigate as the emergency permits and regulate as the emergency requires all matters pertaining to the production, manufacture, storage, transportation, disposal, distribution and sale of milk and milk products in the state of New York. The board shall have the power to subpœna milk dealers, their records, books and accounts, and any other person from whom such information may be desired to carry out the purpose and intent of this article and may issue commissions to take depositions of witnesses absent from the state. Any member of the board or designated employee may sign and issue subpœnas and may administer oaths to witnesses. The provisions of the civil practice act in relation to enforcing obedience to a subpœna lawfully issued by a judge, arbitrator, referee, or other person, or a board or committee, in a matter not arising in an action in a court of record shall apply to a subpœna issued by the board as authorized in this section.

(c) The board may act as mediator and arbitrator in any controversy or issue that may arise among or between milk producers and milk dealers as between themselves or that may arise between them as groups.

(d) The operation and effect of any provision of this article conferring a general power upon the board shall not be impaired or qualified by the granting to the board by this article of a specific power or powers.

§ 304. Rules and orders. The board may adopt and enforce all rules and all orders necessary to carry out the provisions of this article. Every rule or order of the board shall be posted for public inspection in the main office of the board and a certified copy filed in the office of the department of state. An order applying only to a person or persons named therein shall be served on the person or persons affected. An order herein required to be served shall be served by personal delivery of a certified copy, or by mail-
[fol. 26] ing a certified copy in a sealed envelope with postage prepaid to each person affected thereby, or, in the case of a corporation, to any officer or agent of the corporation upon whom a summons may be served in accordance with the provisions of the civil practice act. The posting in the

main office of the board of any rule, and of any order not herein required to be served, and such filing in the office of the department of state, shall constitute due and sufficient notice to all persons affected by such rule or order. A rule of the board when duly posted and filed as provided in this section shall have the force and effect of law. The provisions of this section as to service of orders shall not apply to orders fixing prices of milk as to which provision is made in section three hundred twelve of this article.

§ 305. Investigations. The practice and procedure under this article with respect to any investigation by the board authorized by this article, except as otherwise expressly provided by this article, shall be in accordance with the provisions of article three of this chapter and all of the provisions of such article not inconsistent with the provisions of this article shall apply to such investigation.

§ 306. Entry and inspection. Any member of the board or employee designated for the purpose, shall have access to and may enter at all reasonable hours all places where milk is being stored, bottled or manufactured into food products. Any member of the board or designated employee also shall have power to inspect all books, papers, records or documents in any place within the state for the purpose of ascertaining facts to enable the board to administer this article.

§ 307. Violations; remedies. A violation of any provision of this article or of any rule or order of the board lawfully made, except as otherwise expressly provided by this article, shall be a misdemeanor punishable by a fine not exceeding one hundred dollars, or by imprisonment not exceeding one year, or both, and each day during which such violation shall continue shall be deemed a separate violation. The board may institute such action at law or in equity as may appear necessary to enforce compliance with any provision of this article or to enforce compliance with any rule or order of the board made pursuant to the provisions of this article, and in addition to any other remedy may apply to the supreme court in the third judicial district, for relief by injunction, if necessary, to protect the public interest, without being compelled to allege or prove that an adequate remedy at law does not exist.

[fol. 27] § 308. Licenses to milk dealers; suspension; revocation; review. 1. No milk dealer, as defined in this article, shall buy milk from producers or others for sale within this state, or sell or distribute milk therein unless such dealer be duly licensed as provided in this section, and it shall be unlawful for a milk dealer to buy milk from or sell milk to a milk dealer who is unlicensed, or, in any way deal in or handle milk which he has reason to believe has previously been dealt in or handled in violation of the provisions of this article. The board may by official order exempt from the license requirements provided by this article, milk dealers who purchase or handle milk in a total quantity not exceeding three thousand pounds in any month, and/or milk dealers selling milk in any quantity in markets of one thousand population or less. The board may by official order exempt stores from the license requirements provided by this article where no milk is delivered therefrom to consumers by vehicle.

2. An application for a license to operate as a milk dealer shall be made within thirty days after this article takes effect for the license period commencing May first, nineteen hundred thirty-three and ending March thirty-first following, by mail or otherwise, to the board upon blanks prepared under authority of the board. The applicant shall state the nature of the business to be conducted, the full name of the person applying for the license, and if the applicant be a firm or association, the full name of each member, and if a corporation the names and addresses of all officers and directors, and the city, town or village and the street number, if any, at which the business is to be conducted; facts showing that the applicant has adequate technical personnel, adequate technical and physical facilities to properly conduct the business of receiving and handling milk; that he has complied with all rules and orders of the board filed or served as required in this article, and such other facts with respect to the license as may be required by the board pursuant to this article. Such application shall be accompanied by the license fee required to be paid by this section. A license shall be granted to the applicant by the board, subject to the provisions of this article.

3. The board may decline to grant a license or may suspend or revoke a license already granted upon due notice

and opportunity of hearing to the applicant or licensee, when satisfied of the existence of any of the following:

(a) That a milk dealer has rejected, without reasonable cause, any milk purchased from a producer or has rejected [fol. 28] without reasonable cause or reasonable advance notice, milk delivered by or on behalf of a producer in ordinary continuance of a previous course of dealing, except where contract has been lawfully terminated.

(b) That the milk dealer has failed to account and make payment without reasonable cause, for any milk purchased from a producer.

(c) That the milk dealer has committed any act injurious to the public health, public welfare, or to trade or commerce in demoralization of the price structure of pure milk to such an extent as to interfere with an ample supply thereof for the inhabitants of the state affected by this article which is hereby declared to be injurious to the public health, public welfare and to trade and commerce and evidence of a course of conduct on the part of the licensee tending to such demoralization shall be construed to be prima facie evidence of a violation of this section.

(d) Where the milk dealer has made a general assignment for the benefit of creditors or has been adjudged a bankrupt or where a money judgment has been secured against him, upon which an execution has been returned wholly or partly unsatisfied.

(e) Where the milk dealer has continued in a course of dealing of such a nature as to satisfy the board of his inability or unwillingness properly to conduct the business of receiving or selling milk.

(f) Where the milk dealer has been a party to a combination to fix prices, contrary to law. A co-operative association of dairymen organized under or operated pursuant to the provisions of chapter seventy-seven of the consolidated laws and engaged in making collective sales or marketing for its members or shareholders of dairy products produced by its members or shareholders shall not be deemed or construed to be a conspiracy or combination in restraint of trade or an illegal monoply * nor shall the contracts, agreements, arrangements or combinations heretofore or hereafter made by such association, or the mem-

bers, officers or directors thereof, in making such collective sales and marketing and prescribing the terms and conditions thereof, be deemed or construed to be conspiracies or to be injurious to public welfare, trade or commerce, if otherwise authorized by such chapter or law.

(g) Where the milk dealer has continued in a course of dealing of such nature as to satisfy the board of an intent to deceive or defraud producers or consumers.

[fol. 29] (h) Where there has been a failure either to keep records or to furnish the statements or information required by the board.

(i) Where it is shown that any statement upon which the license was issued is or was false or misleading in any particular.

(j) Where the applicant is a partnership or corporation and any individual holding any position or interest or power of control therein has previously been responsible in whole or in part for any act on account of which a license may be denied, suspended or revoked, pursuant to the provisions of this article.

(k) Where the licensee has violated any of the provisions of this article.

4. A milk dealer receiving during any of the twelve calendar months immediately preceding the period for which the license is issued a daily average total quantity of milk not exceeding four thousand pounds, shall pay a license fee of twenty-five dollars; a milk dealer receiving a daily average total quantity of milk of more than four thousand pounds and not exceeding twenty thousand pounds, shall pay a license fee of seventy-five dollars; a milk dealer receiving a daily average total quantity of milk of more than twenty thousand pounds and not exceeding one hundred thousand pounds, shall pay a license fee of two hundred and fifty dollars; a milk dealer receiving a daily average total quantity of milk of more than one hundred thousand pounds, and not exceeding five hundred thousand pounds, shall pay a license fee of seven hundred fifty dollars; a milk dealer receiving a daily average total quantity of milk

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* So in original. [Word misspelled.]

of more than five hundred thousand pounds, and not exceeding one million pounds, shall pay a license fee of twenty-five hundred dollars; a milk dealer receiving a daily average total quantity of milk of more than one million pounds, shall pay a license fee of five thousand dollars. Milk dealers who have not previously engaged in such business during such prior year shall pay such minimum license fee and in addition thereto, at such time or times as the board may fix, pay an additional sum based upon the daily average total quantity of milk received by such dealers during the license period as fixed by this article. It is not the intent that milk utilized or sold in the form of manufactured products shall be included in the determination of the amount of license fee, but the fluid milk equivalent of cream, and/or condensed or concentrated milk, except when sold in hermetically sealed cans, shall be included in such determination. Sales by a milk dealer [fol. 30] of milk outside of the state not involving the receipt or handling or distribution within the state shall not be included in the determination of the license fee.

5. The board may classify licenses and may issue licenses to milk dealers to store, manufacture or sell milk limited to a particular city or village or to a particular market or markets in the state.

6. The official order of the board, in refusing to issue a license, or in suspending or revoking a license, may be reviewed by certiorari in the manner provided by the civil practice act.

§ 309. Record. The board may require licensees to keep the following records:

(a) A record of all milk received, detailed as to location, and as to names and addresses of suppliers, with butter fat test, prices paid, deductions or charges made.

(b) A record of all milk sold classified as to grade, location and market outlet and size and style of container, with prices and amounts received therefor.

(c) A record of quantities and prices of milk sold.

(d) A record of the quantity of each milk product manufactured and quantity of milk and/or cream used in the

manufacture of each product. Also the quantity and value of milk products sold.

(e) A record of wastage or loss of milk or butter fat.

(f) A record of the items of the spread or handling expense and profit or loss, represented by the difference between the price paid and the price received for all milk.

(g) A record of all other transactions affecting the assets, liabilities, or net worth of the licensee.

(h) Such other records, and information as the board may deem necessary for the proper enforcement of this article.

§ 310. Reports. Each licensee shall, from time to time, as required by rule or order of the board, make and file a verified report on forms prescribed by the board of all matters on account of which a record is required to be kept, together with such other information or facts as may be pertinent and material within the scope of the purpose and intent of this article. Such report shall cover a period of time specified in the order.

§ 311. Report of receipts. On or before the tenth day of each month, the board shall pay over to the department [fol. 31] of taxation and finance, division of finance, all receipts of the board on account of license fees and other moneys received by the board during the preceding month. Such moneys shall be paid into the state treasury, to the credit of the general fund. On or before the tenth day of each month the board shall make a verified and detailed report to the department of taxation and finance of all receipts of the board for the preceding month.

§ 312. Order fixing price of milk. (a) The board shall ascertain by such investigations and proofs as the emergency permits, what prices for milk in the several localities and markets of the state, and under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, having special regard to the health and welfare of children, and be most in the public interest. The board shall take into consideration all conditions affecting the milk industry including the amount necessary

to yield a reasonable return to the producer and to the milk dealer.

(b) The board after making such investigation shall fix by official order the minimum wholesale and retail prices and may fix by official order the maximum wholesale and retail prices to be charged for milk handled within the state for fluid consumption, and wheresoever produced, including the following classes:

1. By milk dealers to consumers.

2. By milk dealers to stores either for consumption on the premises or resale to consumers.

3. By stores to consumers except for consumption on the premises where sold.

4. When, pursuant to statute, regulations adopted thereunder, or ordinance, various grades of milk are specified, the board shall fix the minimum price and may fix the maximum price applicable to each in each of the foregoing classes. Orders fixing minimum and maximum prices may vary in different markets and shall designate the markets to which applicable.

(c) It is the intent of the legislature that the public emergency requires that the benefits of any increase of prices received by milk dealers by virtue of the minimum price provisions of this section shall be given to producers. To that end, if the board after investigation made either upon its own initiative or upon complaint of a representative group of producers supplying a particular dealer [fol. 32] shall determine that such milk dealer purchasing milk from producers or from or through a cooperative corporation of producers organized under or subject to the provisions of chapter seventy-seven of the consolidated laws, in making such purchases has failed to give fair and reasonable effect to such intent, the board shall, upon due notice and after a hearing suspend or revoke the license of the milk dealer so offending and in addition thereto, a violation of this subdivision shall render such offending milk dealer subject to the provisions of section three hundred seven of this article.

(d) The board after making such investigation either on its own initiative or on complaint of a representative group of producers supplying a particular dealer or a particular

market may fix by official order the minimum prices to be paid by milk dealers to producers and others for milk of the various forms included within the definition of milk as used in this article and its various grades and uses. The order of the board with respect to the minimum prices to be paid to the producers and others shall apply to the locality or zone in which the milk is produced, the market or markets in which the milk so produced is sold and may vary in different localities or markets according to varying uses and differing conditions. Each such order may classify such milk by forms, classes, grades or uses as the board may deem advisable and may specify the minimum prices therefor.

(e) After the board shall have fixed prices to be charged or paid for milk in any form included in the definition of milk as used in this article whether by class, grade or use, it shall be unlawful for a milk dealer to sell or buy or offer to sell or buy milk at any price less or more than such price or prices as shall be applicable to the particular transaction, and no method or device shall be lawful whereby milk is bought or sold or offered to be bought or sold at a price less or more than such price, or prices shall be applicable to the particular transaction, whether by any discount, or rebate, or free service, or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise, except as provided in subdivision c of section three hundred and seventeen of this article.

(f) The board may upon its own motion or upon application from time to time alter, revise or amend an official order theretofore made with respect to the prices to be charged or paid for milk. After making such investigation [fol. 33] and before making, revising or amending any order fixing the price to be charged or paid for milk, the board shall give a hearing thereon to all parties interested upon reasonable notice to such interested parties and to the public of such hearing in such newspaper or newspapers as in the judgment of the board shall afford sufficient notice and publicity. Such order of the board may be reviewed by certiorari order at the instance of any ag-

grieved person appearing of record at the hearing either in person or by personal representative and opposing the making of the order.

(g) It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article on the board shall attach. After any such milk so produced shall have come to rest within the state, any sale, within the state by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions, shall be unlawful.

§ 313. Legislative intent. It is the intent of the legislature that no provision of this article shall prevent, and no provision contained therein shall be deemed or construed to prevent a cooperative corporation, organized or operated under or subject to the provisions of chapter seventy-seven of the consolidated laws and engaged in making collective sales or marketing of milk for the producers thereof, from blending the net proceeds of all its sales in various classes and whether in fluid form or as manufactured products, both within and without the state, and paying its producers such blended price, with such deductions and/or differentials as may be authorized under contract between such corporation and its producers, or from making collective sales of the milk of its members and/or other producers represented by it, at a blended price based upon sales thereof in the various classes, and whether in fluid form or as manufactured products, both within and without the state, and which price is to be paid either directly to the producers or to the cooperative corporation. Nothing herein contained shall prevent any milk dealer from contracting for his milk with such cooperative corporation upon such basis. Also that no provision of this article shall be deemed or construed to affect the contracts of such a co-operative corporation with its pro- [fol. 34] ducers nor to affect or abridge the rights and powers of such a corporation conferred by the provisions

of such chapter or any of its operations thereunder, except as in this article otherwise provided.

§ 314. Interstate and federal compacts. The board is hereby vested with authority to confer with legally constituted authorities of other states and of the United States, with respect to a uniform milk control within the states and/or as between states, and may enter into a compact or compacts for such uniform milk control, subject to such federal approval as may be required by law.

§ 315. Reports to governor and legislature. The board shall, when requested, make reports of its proceedings to the governor and to the chairman of the finance committee of the senate and the chairman of the ways and means committee of the assembly.

§ 316. Partial invalidity. If any clause, sentence, paragraph or part of this article shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph or part thereof, directly involved in the controversy in which such judgment shall have been rendered.

§ 317. Construction, exceptions and limitations. (a) The licenses required by this article shall be in addition to any other license required by this chapter or otherwise required by law, and this article shall apply to the city of New York, but shall not be construed to conflict, alter or repeal laws now in force relating to the board or department of health of the city of New York, nor the sanitary code now in force in such city or any amendments thereof duly adopted, nor shall any provisions of this article or any regulations adopted thereunder, relating to matters of health, sanitation or purity or wholesomeness of milk which is in conflict with the sanitary code or the regulations of the board of health of the department of health of the city of New York, apply to the city of New York or to the production and transportation of milk for said city.

(b) This article shall not apply to certified milk, nor to milk sold to the state or any municipality or to the federal government upon bids.

(c) It shall not be unlawful for any milk dealer who, at the time this act shall take effect, is engaged in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants, to sell fluid milk in bottles to stores in such [fol. 35] city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed by the board for such sales to stores in such a city.

§ 318. Saving clause. No provision of this article shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States constitution and to the laws of the United States enacted pursuant thereto.

§ 319. Duration of board. The board shall continue with all the powers and be subject to all the duties and responsibilities prescribed by this article until March thirty-first, nineteen hundred thirty-four, at which time the board shall be deemed abolished and the powers, duties and jurisdiction conferred or imposed upon the board by this article shall terminate. All books, papers, records and documents in the possession of the board when terminated shall be delivered to the department of agriculture and markets.

§ 2. This act shall take effect immediately.

[fol. 36] EXHIBIT "B" TO COMPLAINT

State of New York

Department of Agriculture & Markets, Milk Control Board

Official Order. No. 12

In the Matter of Determining "Well Advertised Trade Name" under the Provisions of Chapter 158 of the Laws of 1933, Section 317, Sub-Section C

It is hereby ordered and determined that the phrase "well advertised trade name" in the Sub-Section above referred to refers to the following:

Borden's Farm Products Co., Inc., "Borden."
Sheffield Farms Co., Inc., "Sealect."
Dairymen's League Co., "Dairylea."
M. H. Renken Dairy Co., "Renken."

This order shall be effective immediately and until further notice.

Dated: Albany, N. Y., May 5, 1933.

Milk Control Board, Charles H. Baldwin, Thomas Parran, Jr., Kenneth F. Fee.

[fol. 37] EXHIBIT "C" TO COMPLAINT

State of New York

Department of Agriculture and Markets, Milk Control Board

Official Order No. 35

In the Matter of the Fixing of the Minimum Prices of Milk in the Metropolitan Area

Such investigations and proofs as the emergency permits having been made and public hearing having been had after notice which in the judgment of the Board is sufficient; and due deliberation having been had, it is hereby ordered

1. Official Orders No. 16 and 25, heretofore promulgated by this Board are hereby annulled.

2. The territory covered by this order is the City of New York, and the counties of Westchester, Rockland, Nassau and Suffolk.

3. All the provisions of this order shall apply to all sales within the territory by any person whomsoever of milk or cream for fluid consumption, except as a separate or different provision may be made by this order or any subsequent order of the Board.

4. The following are the minimum prices which shall be charged in the territory covered by this order.

[fol. 38]

	By milk dealers to consumers	By milk dealers to stores and restaurants	By stores to consumers
Grade "A" Milk:			
Quart bottle	$.15	$.13	$.14
Pint bottle	.10	.08	.09
Half-pint	...	.04½	...
Grade "B" Milk:			
Quart bottles	.12	.10	.11
Pint bottles	.08	.06	.07
Half-pint	...	.03½	...
Unbottled (Bulk) Milk:			
Grade "A" (Qts.)	...	.10½	...
Grade "B" (Qts.)	...	.03½	...
Whole Condensed Milk:			
Quart bottles	...	.29	...
Half-pint	...	.10	...
40-qt. cans	...	8.60	...
Heavy Cream:			
Quart bottles	.68	.53	.58
Pint bottles	.38	.31	.34
Half-pint	.20	.17	.19
Bulk qts	...	.47	.52
Bulk pts	...	...	.27
Bulk ½ pts	...	...	.15
Medium Cream:			
Quart bottles	.57	.44	.49
Pint bottles	.32	.26	.28
Half-pint	.17	.15	.16
Bulk qts	...	.39	.44
Bulk pts	...	...	.22
Bulk ½ pts	...	...	.12
Light Cream (Sweet or Sour):			
Quart bottles	.44	.31	.35
Pint bottles	.25	.19	.22
Half-pint	.13	.11	.12
Bulk qts	...	.27	.31
Bulk pts	...	...	.16
Bulk ½ pts	...	...	.10
Heavy Sour Cream:			
Quart bottles	.54	...	...
Pint bottles	.32	...	...

[fol. 39] 5. In the case of bulk milk sold to operators of bakeries, commissaries and hospitals representing average daily deliveries in any one month of 20 forty-quart cans or more and where delivery is made to a central commissary or other single point the minimum price shall be $3.20 per forty-quart can.

6. In the case of bulk cream sold to operators of bakeries or others buying for consumption or other utilization on the premises and to hospitals representing average daily deliveries in any one month of ten forty-quart cans or more and where delivery is made to a central commissary or other single point, the minimum price for Heavy Cream shall be $17.60 per forty-quart can; the minimum price for Medium Cream shall be $14.80 per forty-quart can and the minimum price for Light Cream shall be $10 per forty-quart can.

7. In the case of Grade A milk sold to schools in half-pint bottles having individual plug caps, the minimum price shall be 4¢ per bottle.

8. For the purpose of this order the term "stores" includes a grocery store, dairy products store, or any other fixed place of business from which milk or cream is sold to consumers without delivery. The minimum price applicable to stores applies only to sales to consumers without delivery, and upon all sales where milk or cream is delivered elsewhere than at the store the minimum price applicable to a sale from a dealer to a consumer shall apply.

9. Until further notice, a deposit of not less than three cents per bottle shall be charged for all milk and cream sold by stores to consumers in bottles.

10. In the case of milk sold to or on account of welfare and charitable agencies and to hospitals and eleemosynary institutions, the minimum prices shall be the prices required by the foregoing schedule to be charged by milk dealers to stores.

11. In the City of New York only it shall not be unlawful for any milk dealer who, on April 10, 1933, was engaged in the business of purchasing and handling milk not having a well advertised trade name to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores

under a well advertised trade name, and the same difference may apply to sales of such milk in such city from stores to consumers.

[fol. 40] 12. In the County of Nassau, the minimum prices to be charged for Grade "A" pasteurized milk shall be those listed in Paragraph 4 of this Order for Grade "A" milk.

13. In the County of Nassau, the minimum prices to be charged for Grade "A" raw milk shall be those listed in Paragraph 4 of this Order for Grade "B" milk.

14. The term "Heavy Cream" as used herein means cream containing 40% of milk fat; the term "Medium Cream" as used herein means cream containing 30% of milk fat; and the term "Light Cream" as used herein means cream containing 20% of milk fat. Any cream containing a greater percentage of milk fat than hereinbefore provided for each respective grade shall be sold at a minimum price correspondingly greater than that fixed for the respective grade.

15. The minimum prices fixed by this order, pursuant to Chapter 158 of the Laws of 1933, shall not apply to certified milk or to milk sold to the state, or any municipality or to the Federal Government upon bids.

This order shall take effect at 1:00 A. M., on Friday, July 21, 1933.

Milk Control Board, Charles H. Baldwin, Thomas Parran, Jr., Kenneth F. Fee.

Dated at Albany, N. Y., July 19, 1933.

[fol. 41] EXHIBIT "D" TO COMPLAINT

State of New York

Department of Agriculture and Markets, Milk Control

Department of Agriculture and Markets, Milk Control
Board

Official Order No. 57.

In the Matter of the fixing of the minimum prices of milk in the Metropolitan Area

1. Official Order No. 35, heretofore promulgated by this Board, is hereby amended as follows:

2. Paragraph 11 of such Order is amended to read as follows:

"On and after the effective date of this Order the minimum prices specified in Paragraph 4 to be charged by milk dealers to stores and restaurants shall be applicable in all the territory covered by this Order, except in the City of New York. In the City of New York only it shall not be unlawful for any store to resell to consumers bottled milk at a price not more than 1 cent per quart below the store to consumer price fixed by this Order, provided such milk is purchased from any milk dealer who, on April 10, 1933, was engaged in the business of purchasing and handling milk not having a well advertised trade name."

This Order shall take effect immediately.

Milk Control Board, Charles H. Baldwin, Thomas Parran, Jr., Kenneth F. Fee.

Dated at Albany, New York, January 30, 1934.

[fol. 42] EXHIBIT "E" TO COMPLAINT

State of New York

An Act to amend the agriculture and markets law, in relation to creating a division of milk control, defining its jurisdiction, powers and duties, and continuing certain special powers and duties during the existing emergency, and making an appropriation therefor

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article twenty-one of chapter forty-eight of the laws of nineteen hundred twenty-two, entitled "An act in relation to agriculture and markets, constituting chapter sixty-nine of the consolidated laws," the title of such chapter having been thus amended by chapter two hundred seven of the laws of nineteen hundred twenty-seven, as amended, is hereby repealed, and a new article twenty-one added in place thereof to read as follows:

Article 21

Milk Control

Section 252. Division of milk control.
253. Definitions.
254. General powers.
255. Rules and orders.
256. Entry, inspection and investigation.
257. Licenses to milk dealers.
258. Application for lincense.
258-a. License fees.
258-b. Bonds and enforcement.
258-c. Granting and revoking licenses.
258-d. Certiorari to review.
258-e. Violations; remedies.
258-f. Records.
258-g. Reports.
258-h. Bond of director and financial officer.
258-i. Disposition of license fees.
258-j. Construction, exceptions and limitations.

[fol. 43] § 252. *Division of milk control.* There shall be in the department a division to be known as the division of milk control. The head of the division shall be a director, who shall be appointed by the commissioner and serve during his pleasure. The functions, powers and duties of the department, as provided by this article, and by article four of this chapter, shall be exercised and performed therein by and through the division of milk control. The functions, powers and duties of the milk control board created by chapter one hundred fifty-eight of the laws of nineteen hundred thirty-three, except as modified by this article and by article twenty-one-a of this chapter, shall be exercised and performed in the department by and through the division of milk control.

§ 253. *Definitions.* As used in this article unless otherwise expressly stated, or unless the context or subject matter otherwise requires:

"Division" means the division of milk control created by this article.

Explanation.—Matter in *italics* is new; matter in [ ] is old law to be omitted.

"Director" means the director of the division of milk control.

"Person" means any person, firm, corporation or association.

"Milk dealer" means any person who purchases or handles or sells milk. Each corporation which if a natural person would be a milk dealer within the meaning of this article, and any subsidiary and affiliate of such corporation similarly engaged, shall be deemed a milk dealer within the meaning of this definition. A hotel or restaurant which sells only milk consumed on the premises where sold, or a producer who delivers milk only to a milk dealer, shall not be deemed a milk dealer.

"Market" means any city, town or village, or two or more cities and/or towns and/or villages and surrounding territory designated by the commissioner as a natural marketing area.

"Licensee" means a licensed milk dealer.

"Milk" means liquid milk and/or cream fresh, sour or storage; and/or condensed or concentrated whole milk, except when contained in hermetically sealed cans. In each instance where quantity is referred to the intent is to include its whole milk equivalent.

"Producer" means a person producing milk.

"Consumer" means any person other than a milk dealer who purchases milk for fluid consumption.

[fol. 44] "Store" means a grocery store, hotel, restaurant, soda fountain, dairy products store and similar mercantile establishment.

§ 254. *General powers.* The department through the commissioner is hereby vested with the powers heretofore conferred upon the milk control board by chapter one hundred fifty-eight of the laws of nineteen hundred thirty-three, and also with the powers heretofore conferred with respect to milk gathering stations, manufactories and plants, including the following:

(a) To supervise and regulate the entire milk industry of New York state, including the production, transportation, manufacture, storage, distribution, delivery and sale of milk and milk products in the state of New York; provided, however, that nothing contained in this article shall be construed to abrogate or affect the status, force or operation of any provision of the public health law, the public

service law, the state sanitary code or any local health ordinance or regulation.

(b) To investigate all matters pertaining to the production, manufacture, storage, transportation, disposal, distribution and sale of milk and milk products in the state of New York. The commissioner shall have the power to subpoena milk dealers, their records, books and accounts, and any other person from whom information may be desired to carry out the purpose and intent of this chapter and may issue commissions to take depositions of witnesses absent from the state. Any designated employee may sign and issue subpoenas and may administer oaths to witnesses and conduct hearings and investigations. The provisions of the civil practice act in relation to enforcing obedience to a subpoena lawfully issued by a judge, arbitrator, referee, or other person, or a board or committee, in a matter not arising in an action in a court of record shall apply to a subpoena issued as authorized in this section.

(c) The commissioner may act as mediator and arbitrator in any controversy or issue that may arise among or between producers and milk dealers as between themselves or that may arise between them as groups.

(d) The operation and effect of any provision of this article conferring a general power shall not be impaired or qualified by the granting by this article of a specific power or powers.

§ 255. *Rules and orders.* The commissioner may adopt and enforce all rules and all orders necessary to carry out the provisions of this article. Every rule or order shall be [fol. 45] posted for public inspection in the main office of the division and a copy filed in the office of the department of state, except an order directed only to a person or persons named therein which shall be served by personal delivery of a copy, or by mailing a copy in a sealed envelope with postage prepaid to each person to whom such order is directed, or, in the case of a corporation, to any officer or agent of the corporation upon whom a summons may be served in accordance with the provisions of the civil practice act. The posting in the main office of the division of any rule and of any order not herein required to be served, and such filing in the office of the department of state, shall constitute due and sufficient notice to all persons affected by such rule or order. A rule when duly posted and filed

as provided in this section shall have the force and effect of law.

§ 256. *Entry, inspection and investigation.* Any employee designated for the purpose shall have access to and may enter at all reasonable hours all places where milk is being stored, bottled or manufactured, or where milk or milk products are being bought, sold or handled, or where the books, papers, records or documents relating to such transactions are kept, and shall have power to inspect and copy the same in any place within the state, and may administer oaths and take testimony for the purpose of ascertaining facts which in the judgment of the commissioner are necessary to administer this chapter.

§ 257. *Licenses to milk dealers.* No milk dealer shall buy milk from producers or others or sell or distribute milk unless such dealer be duly licensed as provided in this article. It shall be unlawful for a milk dealer to buy milk from or sell milk to a milk dealer who is unlincensed, or in any way deal in or handle milk which he has reason to believe has previously been dealt in or handled in violation of the provisions of this chapter. The commissioner may by official order exempt from the license requirements provided by this article, milk dealers who purchase or handle milk in a total quantity not exceeding three thousand pounds in any month, and/or milk dealers selling milk in any quantity in markets of one thousand population or less. The commissioner may by official order exempt stores from the license requirements provided by this article where no milk is delivered therefrom to consumers by vehicle.

§ 258. *Application for license.* An applicant for a license to operate as a milk dealer shall file an application upon a blank prepared under authority of the commissioner. An applicant shall state such facts concerning his circum- [fol. 46] stances and the nature of the business to be conducted as in the opinion of the commissioner are necessary for the administration of this chapter. Such application shall be accompanied by the license fee required to be paid. The commissioner may classify licenses and may issue licenses to milk dealers to carry on a certain kind of business only, or limited to a particular city or village or to a particular market or markets in the state, and may specify the place or places where milk may be received from producers.

The license year shall commence on April first and end on March thirty-first following. An application must be duly made at least thirty days before the commencement of the license year by all milk dealers then doing business, except that for the license year ending March thirty-first, nineteen hundred thirty-five, application shall be duly made within thirty days after this article takes effect by all milk dealers then engaged in business.

§ 258-a. *License fees.* A milk dealer receiving during any of the twelve calendar months immediately preceding the period for which the license is issued, a daily average total quantity of milk not exceeding four thousand pounds, shall pay a license fee of twenty-five dollars; a milk dealer receiving a daily average total quantity of milk of more than four thousand pounds and not exceeding twenty thousand pounds, shall pay a license fee of seventy-five dollars; a milk dealer receiving a daily average total quantity of milk of more than twenty thousand pounds and not exceeding one hundred thousand pounds, shall pay a license fee of two hundred and fifty dollars; a milk dealer receiving a daily average total quantity of milk of more than one hundred thousand pounds, and not exceeding five hundred thousand pounds, shall pay a license fee of seven hundred fifty dollars; a milk dealer receiving a daily average total quantity of milk of more than five hundred thousand pounds, and not exceeding one million pounds, shall pay a license fee of twenty-five hundred dollars; a milk dealer receiving a daily average total quantity of milk of more than one million pounds, shall pay a license fee of five thousand dollars. Milk dealers who have not previously engaged in such business during such prior year shall pay such minimum license fee and in addition thereto, at such time or times as the commissioner may fix, they and all other dealers shall pay an additional sum based upon the daily average total quantity of milk received by such dealers during any month of the license period. It is not the intent that milk utilized or sold in the form of manufactured products shall be included in the determination of the amount of license fee, but the fluid milk equivalent of [fol. 47] condensed or concentrated milk, except when sold in hermeticaly sealed cans, and/or of cream, shall be included in such determination. Sales by a milk dealer of milk outside of the state not involving the receipt or han-

dling or distribution within the state shall not be included in the determination of the license fee. The commissioner may, by rule or order, provide for licensing, at any rate of license fee less than the rates herein fixed, any milk dealer or class of milk dealers, generally or in a particular market, which he is authorized to exempt from license requirements. A milk dealer receiving only milk utilized or sold in the form of manufactured products, other than condensed or concentrated milk, except when sold in hermetically sealed cans, and/or cream, shall pay a license fee of ten dollars.

§ 258-b. *Bonds and enforcement.* Each milk dealer buying milk from producers for resale or manufacture shall execute and file a bond, unless relieved therefrom as hereinafter provided. The bond shall be upon a form prescribed by the commissioner, shall be in the sum fixed by him, but not less than two thousand dollars, shall be executed by a surety company authorized to do business in this state, and shall be conditioned for the prompt payment of all amounts due to producers for milk sold by them to such licensee, during the license year. The bond shall be approved by the commissioner.

Upon default by the licensee in any conditions of the bond, if there is reason to believe that the licensee owes for milk purchased from producers, the commissioner shall give reasonable notice to file verified claims, and may if he deems it advisable fix a reasonable time within which such claims must be filed. The commissioner shall examine claims so filed and by certificate determine the amounts due upon them. The commissioner may bring an action upon the bond, and for the purposes of such action the certificate determining the amounts due shall be presumptive evidence of the facts therein stated. If the recovery upon the bond is not sufficient to pay all claims as finally determined, then it shall be divided pro rata among them.

A licensee shall from time to time, when required by the commissioner, make and file a verified statement of his disbursements during a period to be prescribed by the commissioner, containing the names of the producers from whom milk was purchased, and the amount due to the producers thereof. If it appears from such statement or from facts otherwise ascertained by the commissioner that the security [fol. 48] afforded to producers selling milk to such licensee by the bond does not adequately protect such producers,

the commissioner may require such licensee to give an additional bond in the sum to be determined by the commissioner, but not more than double the value of the maximum amount of milk purchased from producers in any one month, and not exceeding in any event one hundred thousand dollars.

The provisions of this article relative to a milk dealer buying milk from producers for resale or manufacture shall apply also to a milk dealer buying milk from a co-operative association or buying milk from another milk dealer, whenever, in the judgment of the commissioner, protection by bond or otherwise is necessary or desirable to protect the interests of producers.

If the applicant for a license under this section be a natural person or a domestic corporation, the commissioner may, if satisfied from an investigation of the financial condition of the applicant that the applicant is solvent and possessed of sufficient assets to reasonably assure compensation to probable creditors, relieve such person or corporation by order from the provisions of this section requiring the filing of a bond. The commissioner may require, as a condition for so relieving such person or corporation from filing a surety bond, that cash be deposited with a bank or trust company or bonds of the United States or state of New York be deposited with the director, under such terms as will in his opinion afford producers the protection intended by this section.

Bonds for the license year commencing April first, nineteen hundred thirty-five and for subsequent license years shall be filed with the applications. A milk dealer who has filed with the commissioner a bond for the license period ending August thirty-first, nineteen hundred thirty-four, which in the opinion of the commissioner affords ample protection shall not be required to file a bond with his application for a license for the license year ending March thirty-first, nineteen hundred thirty-five, but such a dealer shall file not later than August first, nineteen hundred thirty-four, a bond as required by this section, which shall be effective from September first, nineteen hundred thirty-four, to March thirty-first, nineteen hundred thirty-five, both inclusive.

§ 258-c. *Granting and revoking licenses.* No license shall be granted to a person not now engaged in business as a

milk dealer except for the continuation of a now existing business, and no license shall be granted to authorize the extension of an existing business by the operation of an additional plant or other new or additional facility, unless [fol. 49] the Commissioner is satisfied that the applicant is qualified by character, experience, financial responsibility and equipment to properly conduct the proposed business, that the issuance of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license is in the public interest. The commissioner may decline to grant or renew a license or may suspend or revoke a license already granted, upon due notice and opportunity of hearing to the applicant or licensee, when he is satisfied of the existence of any of the following reasons:

(a) That a milk dealer has rejected, without reasonable cause, any milk purchased or has rejected without reasonable cause or reasonable advance notice, milk delivered in ordinary continuance of a previous course of dealing, except where contract has been lawfully terminated.

(b) That the milk dealer has failed to account and make payment without reasonable cause, for any milk purchased.

(c) That the milk dealer has committed any act injurious to the public health, public welfare, or to trade or commerce in demoralization of the price structure of pure milk to such an extent as to interfere with an ample supply thereof for the inhabitants of the state affected by this article which is hereby declared to be injurious to the public health, public welfare and to trade and commerce and evidence of a course of conduct on the part of the licensee tending to such demoralization shall be construed to be prima facie evidence of a violation of this section.

(d) When the milk dealer is insolvent or has made a general assignment for the benefit of creditors or has been adjudged a bankrupt or where a money judgment has been secured against him, upon which an execution has been returned wholly or partly unsatisfied.

(e) Where the milk dealer has continued in a course of dealing of such a nature as to satisfy the commissioner of his inability or unwillingness properly to conduct the business of receiving or selling milk or to satisfy the commis-

sioner of his intent to deceive or defraud producers or consumers.

(f) Where the milk dealer has been a party to a combination to fix prices, contrary to law. A cooperative association of dairymen organized under or operated pursuant to the provisions of chapter seventy-seven of the consolidated laws and engaged in making collective sales or marketing for its members or shareholders of dairy products produced by its members or shareholders shall not be deemed or construed to be a conspiracy or combination in restraint of trade or an illegal monopoly nor shall the con- [fol. 50] tracts, agreements, arrangements or combinations heretofore or hereafter made by such association, or the members, officers or directors thereof, in making such collective sales and marketing and prescribing the terms and conditions thereof, be deemed or construed to be conspiracies or to be injuries to public welfare, trade or commerce, if otherwise authorized by such chapter or law.

(g) Where there has been a failure either to keep records or to furnish the statements or information required by the commissioner.

(h) Where it is shown that any statement upon which the license was issued is or was false or misleading in any particular.

(i) Where the applicant or licensee has been convicted of a felony.

(j) Where the applicant is a partnership or corporation and any individual holding any position or interest or power of control therein has previously been responsible in whole or in part for any act on account of which a license may be denied, suspended or revoked, pursuant to the provisions of this article or of the similar laws which preceded it.

(k) Where the licensee has violated any of the provisions of this article or of the similar laws which preceded it.

(l) Where the licensee has been duly required to give a bond or an additional bond and has failed to do so.

(m) Where the required permit from the local health officer has terminated or been revoked.

The commissioner may grant or renew a license or may decline to suspend or revoke a license conditionally upon the agreement of the licensee or applicant to do or omit to do any designated act, such condition must have some appropriate relation to the administration of this article or of article twenty-one-a of this chapter.

§ 258-d. *Certiorari to review.* The action of the commissioner in refusing to grant or renew a license, or in revoking or suspending a license, or in conditioning or limiting the granting or renewal of a license, may be reviewed by certiorari in the manner provided by the civil practice act.

§ 258-e. *Violations; remedies.* The commissioner may institute such action at law or in equity as may appear necessary to enforce compliance with any provision of the statutes, rules and orders committed to his administration, and in addition to any other remedy under article three of this chapter or otherwise may apply for relief by injunction if necessary to protect the public interest without being compelled to allege or prove that an adequate remedy at law does not exist. Such application may be made to the su- [fol. 51] preme court in any district of county as provided in the civil practice act and the rules of practice of the court, or to the supreme court in the third judicial district.

§ 258-f. *Records.* The commissioner may require licensees to keep the following records;

(a) A record of all milk received, detailed as to location, and as to names and addresses of suppliers, with butter fat test, prices paid, deductions or charges made.

(b) A record of all milk sold classified as to grade, location and market outlet and size and style of container, with prices and amounts received therefor.

(c) A record of quantities and prices of milk sold.

(d) A record of the quantity of each milk product manufactured and quantity of milk and/or cream used in the manufacture of each product. Also the quantity and value of milk products sold.

(e) A record of wastage or loss of milk or butter fat.

(f) A record of the items or the spread or handling expense and profit or loss, represented by the difference between the price paid and the price received for all milk.

(g) A record of all other transactions affecting the assets, liabilities, or net worth of the licensee.

(h) Such other records, and information as the commissioner may deem necessary for the proper enforcement of this article.

§ 258-g. *Reports.* Each licensee shall, from time to time, as required by rule or order of the commissioner, make and file a verified report on forms prescribed by the commissioner of all matters on account of which a record is required to be kept, together with such other information or facts as may be pertinent and material within the scope of the purpose and intent of this chapter. Such report shall cover a period of time specified in the order.

§ 258-h. *Bond of director and financial officer.* The director and any officer of the division authorized to accept or receive moneys paid or to be paid to the division as provided by this chapter, shall, before he enters upon the discharge of his duties, execute and file a bond in such amount as may be fixed by the head of the department of taxation and finance in the manner provided by the public officers law.

§ 258-i. *Disposition of license fees.* The commissioner shall deposit to his credit all license fees and other moneys collected by the division under this chapter in a responsible [fol. 52] bank, banking house or trust company in the city of Albany which shall pay the highest rate of interest for such deposit. On or before the tenth day of each month the commissioner shall pay over to the department of taxation and finance, division of finance, all license fees received by the division from those to whom licenses were issued during the preceding month and all other moneys received by the division during the preceding month. Such money shall be paid into the state treasury to the credit of the general fund. On or before the tenth day of each month the commissioner shall make a verified and detailed report to the department of taxation and finance of all receipts of the division for the preceding month.

§ 258-j. *Construction, exceptions and limitations.* The license required by this article shall be in addition to any other license required by this chapter or otherwise required by law. This article shall apply to the city of New York, but shall not be construed to conflict with, alter or repeal laws in force relating to the board or department of health of the city of New York, nor the sanitary code in force in such city or any amendments thereof duly adopted, nor shall any provision of this article or any regulations adopted thereunder, relating to matters of health, sanitation or purity or wholesomeness of milk which is in conflict with the sanitary code or the regulations of the board of health o* the department of health of the city of New York, apply to the city of New York or to the production and transportation of milk for said city. If any clause, sentence, paragraph or part of this article shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof, directly involved in the controversy in which such judgment shall have been rendered. No provision of this article shall apply or be construed to apply to foreign or interstate commerce, except insofar as the same may be effective pursuant to the United States constitution and to the laws of the United States enacted pursuant thereto. The transfer by this article to the division of milk control of powers, duties and functions heretofore vested in the milk control board or the commissioner shall be deemed to constitute a continuation thereof and not a new authority, for the purpose of succession to all rights, powers, duties and obligations, and neither such transfer nor the limitation of the period originally designated for duration of the board shall affect any action or proceeding pending at the time of such transfer, and the right to commence an action or proceeding by reason of acts done or rights accrued be- [fol. 53] fore such transfer. Technical, legal and other assistants and employees in the service of the milk control board at the time such transfer takes place shall be transferred to the division, subject to qualifying examinations to be conducted by the civil service commission as soon as

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*Appeared this way in original.

convenient after transfer, and in the meantime they shall serve without examination. The civil service commission shall designate, upon advice of the commissioner the positions which it is not practicable to fill by competitive examination, including the director, assistant director, counsel and assistant counsel. The rules and orders of the milk control board in effect at the time of the transfer shall remain in full force and effect until otherwise provided by the commissioner.

§ 2. Such chapter is hereby amended by adding a new article, to be article twenty-one-a, to read as follows:

Article 21-A

Emergency Milk Control

Section 258-k. Legislative declaration.

258-l. Division; definitions; milk advisory committee.

258-m. Orders fixing prices and handling charges for milk.

258-n. Co-operative corporations.

258-o. Equalization of prices to producers.

258-p. Interstate and federal compacts.

258-q. Construction, exceptions and limitations.

258-r. Application of article; emergency period.

§ 258-k. *Legislative declaration.* The legislature having declared by chapter one hundred fifty-eight of the laws of nineteen hundred thirty-three that certain conditions exist relative to the production, sale and distribution of milk and milk products in this state, endangering the public health and public welfare and amounting to a public emergency in the milk industry of the state, it is hereby declared that such emergency still exists and may reasonably be expected to continue until April first, nineteen hundred thirty-five.

§ 258-l. *Division; definitions; milk advisory committee.* 1. The functions, powers and duties provided by this article shall be exercised and performed by and through the division of milk control created by article twenty-one of this chapter, and the definitions used in such article shall be applicable to this article also except as the context otherwise indicates.

[fol. 54] 2. There shall be in the division a milk advisory committee, which shall consist of not less than eleven nor more than fifteen members. The commissioner shall appoint the members of the committee, to serve until March thirty-first, nineteen hundred thirty-five, as follows: At least one member and not more than two members from a list of not less than five persons nominated by each of the following organizations: Dairymen's League Co-operative Association, Inc.; Sheffield Producers Co-operative Association, Inc.; Greater New York-New Jersey Milk Institute, Inc.; Brooklyn and Queens Milk Dealers Association of New York City; and New York State Milk Distributors, Inc. The commissioner shall provide for the time when such nominations shall be filed and make any other provision which he deems necessary or advisable with respect to the making or filing of such nominations or filling a vacancy in such committee. The president of the New York state agricultural society shall be a member of the committee. The commissioner shall appoint some other person as a member of such committee to represent the interests of producers not members of either of the two producers' co-operative associations specified. The commissioner shall appoint the remaining members of the committee in such number, within the limits above specified, from such persons as in his judgment shall best bring about such representation on the committee as a whole as will best protect the public interest. The commissioner shall confer with the committee relative to the making, altering, revising or amending of any official order under provisions of section two hundred fifty-eight-m, and shall make no order under provisions of section two hundred fifty-eight-o without the affirmative vote of a majority of the committee. The commissioner shall call a meeting of and confer with the committee when requested so to do by a majority of the members of such committee with respect to making, altering, revising or amending of any official order under provisions of section two hundred fifty-eight-m and/or section two hundred fifty-eight-o. The members of the committee shall receive no compensation for their services, but shall be paid and receive traveling and other expenses incurred in performance of their duties.

§ 258-m. *Orders fixing prices and handling charges for milk.* The commissioner shall investigate what are reason-

able costs and charges for producing, hauling, handling, processing and/or other services performed in respect to milk, and what prices for milk in the several localities and markets of the state, and under varying conditions, will [fol. 55] best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, and be most in the public interest. The commissioner shall take into consideration the balance between production and consumption of milk, the costs of production and distribution, and the purchasing power of the public.

1. The commissioner, after making such investigations, may fix, by official order:

(a) The minimum prices to be paid by milk dealers to producers and others for milk in its various grades and uses. The order of the commissioner with respect to the minimum prices to be paid to producers and others shall apply to the locality or zone in which the milk is produced, the market or markets in which milk so produced is sold, and may vary in different localities or zones or markets according to varying uses and differing conditions.

When, in the judgment of the commissioner, it is necessary or advisable, in order to promote a proper balance between the supply of and the demand for milk, to fix a lesser price for milk which is produced in excess of what is needed for fluid consumption, he may establish a quantity or quota applicable to each producer, or to certain classes of producers, or to producers producing for a certain market or markets but no such quota shall be established until pursuant to federal or state statutes, or by action of authorities duly constituted and authorized thereunder, quotas are established and made effective throughout all the states comprising the New York milk shed, as that term is commonly understood in the milk industry. For that purpose the commissioner may require any milk dealer to supply necessary information about the quantities of milk received from producers during a specified period of time, and to determine a quota or quantity for each such producer in accordance with rules to be adopted by the commissioner, and subject to review and approval by him. The commissioner may determine the prices to be received by producers for milk within the quota and for milk in excess of it.

Each order fixing prices or handling charges may classify milk by forms, classes, grades or uses as the commissioner may deem advisable and may specify the minimum prices therefor.

It is declared to be the legislative intent that producers of milk in this state who sell their milk to milk dealers for shipment into or sale in another state where prices to producers are regulated by a state board or other authority, with powers substantially similar to those conferred [fol. 56] by this article shall receive the prices required to be paid for milk purchased from producers in such other states under similar conditions, for similar purposes and with proper allowance for transportation. It shall be unlawful for any milk dealer, except in any case where the commissioner shall otherwise determine, to pay a producer for milk to be sold in such other state a price lower than that required to be paid for milk purchased from producers in such other state under similar conditions and for similar purposes.

(b) The minimum and/or maximum wholesale or retail prices to be charged for milk handled within the state for fluid consumption and wheresoever produced, when sold by milk dealers to consumers; by milk dealers to stores either for consumption on the premises or resale to consumers; by stores to consumers except for consumption on the premises where sold; by milk dealers to other milk dealers. A minimum wholesale or retail price to be charged for milk shall not be fixed higher than is necessary to cover the costs of ordinarily efficient and economical milk dealers, including a reasonable return upon necessary investment. The fact that some dealers selling milk not having a well advertised trade name to stores in a city of more than one million inhabitants avail themselves of the privilege of making such sales at less than the minimum price shall not require fixing of the price higher than would otherwise be necessary.

(c) The amount of handling and/or processing charges to be included in the price charged or paid by milk dealers for milk involved in transactions between dealers. Such charges shall be classified according to the services performed or paid for by the dealer who sells the milk.

2. After the commissioner shall have fixed prices and/or handling charges to be charged or paid for milk in any

form included in the definition of milk as used in this article whether by class, grade or use, it shall be unlawful for a milk dealer to sell or buy or offer to sell or buy milk at any price less or more than such price or prices as shall be applicable to the particular transaction, and no method or device shall be lawful whereby milk is bought or sold or offered to be bought or sold at a price less or more than such price, or prices as shall be applicable to the particular transaction, whether by a discount or rebate, or free service, or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for the milk and the price or prices [fol. 57] for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise.

3. The commissioner may upon his own motion or upon application from time to time, alter, revise or amend an official order theretofore made with respect to the prices and/or handling charges to be charged or paid for milk. Before making, revising or amending any order fixing the prices and/or handling charges to be charged or paid for milk, the commissioner shall give a hearing thereon to all parties interested upon reasonable notice to such interested parties and to the public of such hearing in such newspaper or newspapers as in the judgment of the commissioner shall afford sufficient notice and publicity. Such order of the commissioner may be reviewed by certiorari at the instance of any aggrieved person appearing of record at the hearing either in person or by personal representative and opposing the making of the order.

4. It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article shall attach. After any such milk so produced shall have come to rest within the state, any sale, within the state by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that

required to be paid for milk produced within the state purchased under similar conditions, shall be unlawful.

§ 258-n. *Co-operative corporations.* It is the intent of the legislature that no provision of this article shall prevent, and no provision contained therein shall be deemed or construed to prevent a co-operative corporation, organized or operated under or subject to the provisions of chapter seventy-seven of the consolidated laws and engaged in making collective sales or marketing of milk for the producers thereof, from blending the net proceeds of all its sales in various classes and whether in fluid form or as manufactured products, both within and without the state, and paying its producers such blended price, with such deductions and/or differentials as may be authorized under contract between such corporations and its producers, or from making collective sales of the milk of its members and/or other producers represented by it, at a blended price based upon [fol. 58] sales thereof in the various classes, and whether in fluid form or as manufactured products, both within and without the state, and which price is to be paid either directly to the producers or to the co-operative corporation. Nothing herein contained shall prevent any milk dealer from contracting for his milk with such co-operative corporation in such manner, but all such contracts shall be upon the basis of the prices and handling charges fixed by the commissioner, with the result that the net price received for milk by the co-operative corporation shall be commensurate with such prices and handling charges; and further provided that no milk dealer shall receive from a co-operative corporation directly or indirectly any discounts, rebates or compensation through rentals or otherwise for the purpose or with the effect of reducing the net cost to the dealer for milk purchased by or through a cooperative corporation. Also that no provision of this article shall be deemed or construed to affect the contracts of such a co-operative corporation with its producers nor to affect or abridge the rights and powers of such a corporation conferred by the provisions of chapter seventy-seven of the consolidated laws or any of its operations thereunder, except as in this article otherwise provided.

§258-o. *Equalization of prices to producers.* 1. It is hereby declared to be the legislative intent that in so far as

lawful and practicable all producers shall receive the same price for milk subject only to reasonable differences for quality and location, and for production in accordance with quotas as provided in section two hundred fifty-eight-m of this article, and subject to gains or losses, deductions or extra payments reflected in blended prices paid by a cooperative corporation to its producers as provided in section two hundred fifty-eight-n of this article.

2. In order to effect such equalization of prices to producers, the commissioner may determine as soon as practicable after the end of each month, from reports submitted by milk dealers, an equalized base price for milk sold by producers during that month, and the adjustments to be made for quality and location and for production in accordance with quotas. Such equalized base prices and adjustments may be determined for all milk sold by producers or may be determined separately for milk sold by producers in any locality or zone or market as determined by the commissioner. The commissioner may, by official order, require milk dealers who purchase milk from producers in the locality or zone or market affected thereby to pay for such milk in accordance with such equalized base prices and adjustments.

[fol. 59] 3. After an official order has been issued, requiring milk dealers to pay producers in accordance with an equalized base price, the commissioner shall maintain for each milk dealer affected by such order an adjustment account which shall be:

(a) Debited with the value of milk purchased by such milk dealer during the calendar month, computed on the basis of minimum prices fixed pursuant to this article.

(b) Credited with the value of milk purchased by such milk dealer during the calendar month, computed on the basis of the equalized base price and adjustments fixed pursuant to this article.

4. The commissioner may, by official order, fix the time and manner of settlement of balances on adjustment accounts and each milk dealer shall pay to or receive from the fiscal agent, as the case may be, the amount of such balance as so fixed. The commissioner may require that any milk dealer or milk dealers give a surety bond or other

security conditioned to secure prompt payment to the fiscal agent, and the giving of such bond or security shall be subject to the provisions of article twenty-one of this chapter. The commissioner may designate one or more trust companies to act as fiscal agents for handling such balances, and fix their compensation therefor. Payments made to the fiscal agents on account of such balances shall not be deemed to be included within the provisions of section two hundred fifty-eight-i of this chapter and shall not be deemed to be state funds. Whenever there is a balance on hand from any source in excess of any adjustments to be made to milk dealers, the commissioner may, by official order, provide for distribution of such balance or any part thereof in an equitable manner to the producers concerned.

The provisions of this section shall not become operative, however, until pursuant to federal or state statutes, or by action of authorities duly constituted and authorized thereunder, prices to producers are so equalized and made effective throughout all the states comprising the New York milk shed, as that term is commonly understood in the milk industry.

§ 258-p. *Interstate and federal compacts.* The commissioner is hereby authorized to confer with legally constituted authorities of other states and of the United States with respect to a uniform milk control within the states and/or as between states, and may exercise his powers hereunder to effect such uniform milk control.

[fol. 60] § 258-q. *Construction, exceptions and limitations.* This article shall apply to the city of New York, but shall not be construed to conflict with, alter or repeal laws in force relating to the board or department of health of the city of New York, nor the sanitary code in force in such city or any amendments thereof duly adopted, nor shall any provisions of this article or any regulations adopted thereunder, relating to matters of health, sanitation or purity or wholesomeness of milk which is in conflict with the sanitary code or the regulations of the board of health or the department of health of the city of New York, apply to the city of New York or to the production and transportation of milk for said city. If any clause, sentence, paragraph or part of this article shall, for any reason, be adjudged by any court of competent jurisdiction to be in-

valid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph or part thereof, directly involved in the controversy in which such judgment shall have been rendered. No provision of this article shall apply or be construed to apply to foreign or interstate commerce, except insofar as the same may be effective pursuant to the United States constitution and to the laws of the United States enacted pursuant thereto. This article shall not apply to milk sold to the federal government nor shall it prevent the buying of milk by the state or any municipality upon bids. It shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-three has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city.

§ 258-r. *Application of article; emergency period.* The provisions of this article shall apply during the emergency period as defined by this section. "Emergency period" means the period between the time this article takes effect and April first, nineteen hundred thirty-five. Any action or proceeding pending on April first, nineteen hundred thirty-five, and any right of action or cause of prosecution then accrued or existent arising out of this article or any violation of it may be prosecuted to final determination, and [fol. 61] for such purposes the provisions of this article shall be deemed to be in full force and effect.

§ 3. The sum of two hundred and fifty thousand dollars ($250,000), or so much thereof as may be necessary, is hereby appropriated to the department of agriculture and markets from any moneys in the state treasury not otherwise appropriated to pay the expenses of the department in carrying out the provisions of articles twenty-one and twenty-one-a of the agriculture and markets law, as added

by this act, payable on the audit and warrant of the comptroller in the manner provided by law. The moneys hereby appropriated shall be in addition to any other moneys appropriated to the department of agriculture and markets.

§ 4. This act shall take effect April first, nineteen hundred thirty-four.

[fol. 62] EXHIBIT "F" TO COMPLAINT

State of New York

Department of Agriculture and Markets, Division of Milk Control

Official Order 59

In the matter of Fixing Minimum Prices of Milk in the Metropolitan Area

It is hereby Ordered that:

1. Official Order No. 57 heretofore promulgated by the Milk Control Board hereby is annulled.

2. Official Order No. 35 heretofore promulgated by the Milk Control Board is hereby amended as follows:

a. The minimum price to be charged for light sour cream by stores to consumers in bulk when the customer furnishes the container shall be thirty-one (31) cents per quart, sixteen (16) cents per pint and eight (8) cents per half pint. An additional charge of one (1) cent shall be made for each none-re-usable container supplied to the customer.

b. Paragraph 10 of such Official Order No. 35 is hereby amended to read as follows:

"10. In the case of milk sold to or on account of welfare and charitable agencies and to hospitals and eleemosynary institutions, the minimum prices shall be the prices required by the foregoing schedule to be charged by milk dealers to stores, except that the prices fixed by this order shall not apply to hospitals not operating for profit which use forty (40) quarts or more of milk per day and the prices for such hospitals shall be at least the Class 1 price

as fixed to producers plus the cost of transporting and processing."

This order shall take effect at 1:00 A. M. on Monday, April 9, 1934.

Charles H. Baldwin, Commissioner of Agriculture and Markets.

Dated at Albany, N. Y., April 4, 1934.

[fol. 63] EXHIBIT "G" TO COMPLAINT

§38. When injunction may be obtained. In an action in the supreme court for the recovery of a penalty or forfeiture incurred for the violation of any of the provisions of this chapter, or of any other law the enforcement of which is within the jurisdiction of the department, or of the rules of the department, an application may be made on the part of the people to the court or any justice thereof for an injunction to restrain the defendant, his agents and employees from the further violation of such provisions. The court or justice to whom such application is made, shall grant such injunction on proof, by affidavit, that the defendant has been guilty of the violations alleged in the complaint, or of a violation of any such provision subsequent to the commencement of the action. No security on the part of the plaintiff shall be required, and costs of the application may be granted or refused in the discretion of the court or justice. If the plaintiff shall recover judgment in the action for any penalty or forfeiture demanded in the complaint, the judgment shall contain a permanent injunction, restraining the defendant, his agents and employees from any further violation of such provisions of this chapter or of any other law the enforcement of which is within the jurisdiction of the department or of the rules of the department. Any injunction, order or judgment obtained under this section may be served on the defendant by posting the same upon the outer door of the defendant's usual place of business, or where such violation was or is committed, or in the manner required by the civil practice, and the rules and practice of the court. Personal service of the injunction shall not be necessary when such service cannot be

secured with reasonable diligence, but the service herein provided shall be deemed sufficient in any proceeding for the violation of such injunction.

§39. Penalties for violation of chapter or other laws. Every person violating any of the provisions of this chapter, or of any other law the enforcement of which is within the jurisdiction of the department shall, except where other penalties are hereinafter prescribed, be subject to a penalty in the sum of not less than twenty-five dollars nor more than one hundred dollars for the first violation, nor more than two hundred dollars for the second and each subsequent violation; provided, however, that for a violation by a retail merchant of section two hundred and twelve of this [fol. 64] chapter, or of article thirteen-a of this chapter, the minimum penalty shall be ten dollars. When such violation consists of the manufacture or production of any prohibited article, each day, during which or any part of which such manufacture or production is carried on or continued, shall be deemed a separate violation. When the violation consists of the sale, or the offering or exposing for sale or exchange of any prohibited article or substance, the sale of each one of several packages shall constitute a separate violation, and each day on which any such article or substance is offered or exposed for sale or exchange shall constitute a separate violation. If the sale be of milk and it be in cans, bottles or containers of any kind and if the milk in any one of such containers be adulterated, it shall be deemed a violation whether such vendor be selling all the milk in all of his containers to one person or not. When the use of any such article or substance is prohibited, each day during which or any part of which such article or substance is so used or furnished for use, shall constitute a separate violation, and the furnishing of the same for use to each person to whom the same may be furnished shall constitute a separate violation. When the storage of any article is prohibited beyond a certain period, each day during which or any part of which any article is so stored beyond the period provided for by this chapter, shall constitute a separate violation.

A right of action for the recovery of, or a liability for, penalties incurred as provided in this chapter, or in any other law the enforcement of which is within the jurisdiction of the department, may be released, settled or com-

promised before the matter is referred to the attorney-general as provided in section forty-four of this chapter, and thereafter may be released, settled or compromised by the attorney-general, either before or after an action is brought to recover such penalties.

§40. Penalty for violation of rule or order. Every person, association or corporation and all agents, officers and employees thereof, shall obey every order made as provided in this chapter, so long as such order shall be in force. A person, association or corporation who shall fail by himself, itself or through his or its agents, officers and employees, to obey any order of the commissioner, or who shall violate any rule of the department shall be subject to a penalty not exceeding the sum of two hundred dollars for each and every offense. Every violation of such order, or of the rules of the department, shall be a separate and distinct offense, and in case of a continuing violation, every day's continuance thereof shall be a separate and distinct offense.

[fols. 65 & 66] EXHIBIT "H" TO COMPLAINT . .

§ 41. Violation of chapter a misdemeanor. Except as otherwise provided by the penal law, a person who by himself or another violates any of the provisions of this chapter or of any other law the enforcement of which is within the jurisdiction of the department, is guilty of a misdemeanor, and upon conviction shall, except as otherwise provided in this chapter, be punished by a fine of not less than twenty-five dollars, nor more than two hundred dollars, or by imprisonment for not less than one month, nor more than six months, or both such fine and imprisonment, for the first offense; and by not more than one year's imprisonment for the second offense.

[fol. 67] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE—Filed April 27, 1934

Upon reading the bill of complaint, verified April 26th, 1934, on file in the above entitled action, and the affidavit of

John F. Watson, sworn to on April 26th, 1934, and upon the motion of Milbank, Tweed, Hope & Webb, solicitors for the plaintiff, for an order requiring the defendants herein to show cause, if any they have, why they should not be enjoined and restrained during the pendency of this action and until the determination thereof from bringing or prosecuting or attempting to bring or to prosecute, directly or indirectly, or causing to be brought or prosecuted, directly [fol. 68] or indirectly, pursuant to any of the provisions of the Agriculture and Markets Law of the State of New York, any action, suit or proceeding at law or in equity or any criminal action or proceeding:

(a) Against the plaintiff, or any of the officers, agents or employees thereof by reason of the plaintiff selling or attempting to sell to stores in the City of New York, or from its stores in the said City to consumers, its fluid milk in bottles under its trade name "Borden's" at a price less than the minimum price for such sales fixed or which may be fixed from time to time by the said Commissioner but not less than the lowest price at which any other person, firm, corporation or association is or may be authorized or permitted to sell fluid milk in bottles to stores or from stores to consumers, as the case may be, in said City;

(b) Against any other person, firm, corporation or association in the City of New York or any of the officers, agents or employees thereof, or from revoking any license required by Article 21 of the Agriculture and Markets Law of the State of New York to be obtained and held by any such person, firm, corporation or association, by reason of such person, firm, corporation or association purchasing from the plaintiff, or selling to consumers in said City, plaintiff's fluid milk in bottles under its trade name "Borden's" at a price less than the minimum price for such sales fixed or which may be fixed from time to time by the said Commissioner but not less than the lowest price at which such person, firm, corporation or association is or may be authorized or permitted to purchase or to sell to consumers, as the case may be, the fluid milk of any other person, firm, corporation or association in bottles in said City;

(c) Against the plaintiff or any officer, agent or employee thereof by reason of the plaintiff continuing on or

after May 1, 1934, its business as a milk dealer without having first obtained the licenses required by Article 21 of the said Agriculture and Markets Law or against any other [fol. 69] person, firm, corporation or association or any officer, agent or employee thereof or from revoking any license required by said Article 21 to be obtained and held by any such person, firm, corporation or association by reason of such person, firm, corporation or association purchasing milk from or selling milk to the plaintiff or in any way dealing in or handling milk of the plaintiff although the plaintiff shall not have obtained the licenses required by Article 21 of the said Agriculture and Markets Law; provided, however, that the plaintiff shall not have taken any action or omitted to take any action constituting grounds for refusal or revocation of the licenses provided for by Article 21 of said Agriculture and Markets Law other than (a) by refusing to agree in writing on or before April 30, 1934, to comply with and obey the provisions of the said Agriculture and Markets Law and the rules and orders promulgated by the said Commissioner, and in particular by refusing to agree in writing on or before said date to sell to stores in the City of New York, and from its stores in the said City to consumers, its fluid milk in bottles under its trade name "Borden's" at a price not less than the minimum price fixed in applicable orders promulgated from time to time by the said Commissioner, or (b) by the sale to stores in the City of New York, or from its stores in the said City to consumers, of its fluid milk in bottles under its trade name "Borden's" at a price less than the minimum price for such sales fixed or which may be fixed from time to time by the said Commissioner but not less than the lowest price at which any other person, firm, corporation or association is or may be authorized or permitted to sell fluid milk in bottles to stores or from stores to consumers, as the case may be, in said City;

and why the plaintiff should not have such other and further relief as to the Court may seem just and equitable in the premises:

[fol. 70] And it further appearing from the verified bill of complaint filed herein, and the said affidavit of John F. Watson, that this is a proceeding to restrain the above named defendants, and each of them, in their respective

official capacities, from doing or causing or permitting to be done, directly or indirectly, any of the acts or things hereinabove set forth; and an interlocutory injunction being prayed for herein;

And this motion being filed pursuant to the provisions of Sections 380, 381 and 382 of Title 28, United States Code (Judicial Code, Section 266, amended) for the issuance of a temporary restraining order upon the grounds set forth in the bill of complaint and the said affidavit of John F. Watson, to prevent immediate and irreparable injury, loss and damage which would otherwise result to the plaintiff before the hearing and determination of the application for interlocutory injunction herein may be had, or notice thereof be served, because the defendants, Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, and Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets, have notified the plaintiff that they will refuse to grant to the plaintiff the licenses which the plaintiff is required to obtain to conduct its business on or after May 1, 1934 as a milk dealer pursuant to the provisions of Section 258 of Article 21 of the Agriculture and Markets Law of the State of New York, unless the plaintiff shall on or before April 30, 1934, agree in writing to comply with and obey the provisions of the said Agriculture and Markets Law and the rules and orders promulgated by the said Commissioner, and in particular unless the plaintiff shall agree in writing to sell to stores in the City of New York, and from its stores in the said City to consumers, its fluid milk in bottles under its trade name "Borden's" at a price not less than the minimum price fixed in applicable orders promulgated from time to time by the said Commissioner, although other persons, firms, corporations and associations which are competitors of the plaintiff are permitted to make sales of fluid milk in bottles to stores in the said City at a price one cent per quart less than the minimum so imposed [fol. 71] upon the plaintiff by such orders; and also because the said defendants have threatened to invoke against the plaintiff the remedies provided in the said Agriculture and Markets Law if the plaintiff shall, without having first obtained the said required licenses on or before April 30, 1934, continue its business as a milk dealer on or after

May 1, 1934; and also because the said defendants have threatened to invoke against the plaintiff the remedies provided in the said Agriculture and Markets Law if the plaintiff shall sell or attempt to sell to stores in the City of New York, or from its stores in the said City to consumers, its fluid milk in bottles under its trade name "Borden's" at a price less than the minimum price fixed in applicable orders promulgated from time to time by the said Commissioner; and also because, if the plaintiff complies with and obeys the provisions of the said Agriculture and Markets Law and the said rules and orders promulgated by the said Commissioner, the plaintiff's market for the sale to stores in the City of New York of its fluid milk in bottles under its trade name "Borden's" will be impaired to the extent of at least 25,000 quarts daily, and the plaintiff further making its application to this Court for a hearing in this cause for an interlocutory injunction in accordance with the said Sections 380, 381 and 382 before three judges, one of whom at least shall be a Circuit Judge of the United States, as provided in the said Section 380, now, therefore, this Court being fully advised, it is

Ordered, that the application for such interlocutory injunction be heard on the 4th day of May, 1934, at 10:30 o'clock in the forenoon, in Room 235, Old Post Office Building, Borough of Manhattan, City of New York, State of New York, before three judges, as provided in the said Section 380; and it is further

Ordered, that the defendants, and each of them, in their respective official capacities, be and they hereby are restrained until the hearing and determination of the application of the plaintiff for its interlocutory injunction herein from bringing or prosecuting or attempting to bring or to prosecute, directly or indirectly, or causing to be [fol. 72] brought or prosecuted, directly or indirectly, any action, suit or proceeding at law or in equity or any criminal action or proceeding against the plaintiff or any officer, agent or employee thereof by reason of the plaintiff continuing on or after May 1, 1934, its business as a milk dealer without having first obtained the licenses required by Article 21 of the said Agriculture and Markets Law or against any other person, firm, corporation or association or any officer, agent or employee thereof or from re-

voking any license required by said Article 21 to be obtained and held by any such person, firm, corporation or association by reason of such person, firm, corporation or association purchasing milk from or selling milk to the plaintiff or in any way dealing in or handling milk of the plaintiff although the plaintiff shall not have obtained the licenses required by Article 21 of the said Agriculture and Markets Law; provided, however, that the plaintiff shall not have taken any action or omitted to take any action constituting grounds for refusal or revocation of the licenses provided for by Article 21 of said Agriculture and Markets Law other than by refusing to agree in writing on or before April 30, 1934, to comply with and obey the provisions of the said Agriculture and Markets Law and the rules and orders promulgated by the said Commissioner, and in particular by refusing to agree in writing on or before said date to sell to stores in the City of New York, and from its stores in the said City to consumers, its fluid milk in bottles under its trade name "Borden's" at a price not less than the minimum price fixed in applicable orders promulgated from time to time by the said Commissioner.

And it is further ordered, that the plaintiff file a bond conditioned as required by law in the sum of $5,000.00 for the payment of all damages which may accrue by virtue of the issuance of this temporary restraining order;

And it is further ordered, that this order shall be in full force and effect and shall be obligatory and binding upon the defendants, and each of them, and all persons acting by, through or under them, upon the service of a copy [fol. 73] thereof upon them or upon their solicitor or solicitors of record in this cause;

And it is further ordered, that a copy of the bill of complaint herein, a copy of the said affidavit of John F. Watson and a copy of this order be served upon Honorable Herbert H. Lehman, Governor of the State of New York.

This order signed at New York on the 26th day of April, 1934, at eight o'clock P. M.

Francis G. Caffey, United States District Judge.

[fol. 74] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JOHN F. WATSON—Filed April 27, 1934

UNITED STATES OF AMERICA,
State of New York,
Southern District of New York, ss:

John F. Watson, being duly sworn, deposes and says:

1. That he is a Vice President of Borden's Farm Products Company, Inc., the plaintiff in the above entitled action and is authorized to make this affidavit in support of the plaintiff's application for a temporary restraining order and for an interlocutory injunction.

2. That he has read the bill of complaint in the above entitled cause and knows the contents thereof and begs [fol. 75] leave to incorporate in this affidavit each and every allegation therein contained with the same force and effect as if set forth herein at length.

3. That the plaintiff is a corporation duly organized and existing under the laws of the State of New York and has an office and place of business at No. 110 Hudson Street, in the City of New York. The plaintiff has an authorized capital stock of 1,400,000 shares of the par value of $25 each, of which there are 1,002,000 shares issued and outstanding. The plaintiff was organized in 1917 and shortly thereafter it acquired from The Borden Company, a corporation of the State of New Jersey, the fluid milk business theretofore conducted by said The Borden Company in and about the City of New York and elsewhere.

4. The business of the plaintiff consists, among other things, of purchasing and handling and selling fluid milk and cream and other dairy products in and about the State of New York in the entire area known as the New York Metropolitan District, which includes the City of New York and the territory surrounding the said city within a radius of approximately fifty miles from the center of Manhattan Island. In the conduct of its business, the plaintiff purchases milk and cream and sells the same to consumers and to stores, among others. The plaintiff

maintains and operates and for some time past has maintained and operated in the said city, nine pasteurizing plants and eight retail stores for the distribution of fluid milk in bottles. The plaintiff has acquired for the conduct of its business, and owns in the five boroughs of the City of New York real property which in 1933 had an assessed valuation of $5,296,500, and upon which the plaintiff paid taxes in the amount of $129,188.73. On December 31, 1933, plaintiff employed 5,109 persons in the conduct of its said business in the said city.

5. That the fluid milk sold in bottles by the plaintiff in the City of New York is sold under the plaintiff's trade name "Borden's", which said trade name has been used by the plaintiff and its predecessor in title in the sale of [fol. 76] milk in the City of New York for more than 75 years and is a valuable asset of the plaintiff and constitutes an essential part of its good will. The plaintiff and its predecessor in title have expended large sums of money in advertising its trade name "Borden's".

6. That in the year 1933, the plaintiff expended in newspaper advertising alone in the New York Metropolitan Area in all of which advertising the plaintiff's trade name "Borden's" was prominently displayed, approximately $230,000.

7. That in 1933 the average number of quarts of fluid milk in bottles sold daily by the plaintiff under its trade name "Borden's" throughout the five boroughs of the City of New York exceeded 600,000. Of this amount more than 200,000 quarts were sold daily by the plaintiff to stores throughout said city for resale to consumers.

8. That there are in the City of New York more than 40,000 stores licensed to sell fluid milk in bottles to consumers. In addition to the plaintiff, there were in 1933 more than 150 licensed milk dealers selling bottled milk to such stores.

9. That the sale of bottled milk to stores in the City of New York is a highly competitive business. A large number of the said other licensed milk dealers concentrate such sales in particular districts or localized areas within the said city. Within such particular districts and localized areas many of the said other licensed milk dealers conduct aggressive advertising campaigns by means of local news-

papers, billboards, street cars, posters and radio. The volume of such local advertising of said other milk dealers often exceeds the volume of advertising done by the plaintiff in such particular districts and localized areas. The cost of all advertising by the plaintiff of its trade name "Borden's" in the City of New York for many years past has not exceeded one-fifth of one cent per quart of milk sold by the plaintiff in the said City. Upon information and belief, that the cost of advertising per quart of milk sold by the plaintiff in the said City is not greater than the cost to many of the plaintiff's competitors which are [fol. 77] not classified by the Commissioner of Agriculture and Markets as having well advertised trade names.

10. That under the Sanitary Code of the City of New York stores are prohibited from selling loose milk and are permitted to sell milk only in bottles. Each bottle containing milk is required by the said Sanitary Code to have imprinted on the cap thereon the name of the milk dealer. By reason of the long continued and presently existing financial depression large numbers of the persons in the City of New York who purchase bottled milk from stores in the said City are unable to afford to buy the plaintiff's bottled milk because of the additional one cent which must be paid for each quart because of the fact that, so far as the deponent is informed and believes, all licensed milk dealers, other than those referred to in Official Order No. 12 referred to in the complaint, a copy of which is annexed to the complaint and marked Exhibit B, have taken advantage of the permission contained in Section 258-q of Article 21-A of the Agriculture and Markets Law and sell their bottled milk to stores in the City of New York at least one cent less per quart bottle than the minimum price at which the plaintiff is permitted to sell its fluid milk under its trade name "Borden's" to the stores in the said City. Moreover, under the provisions of the said Article 21-A stores in the said City are permitted to sell to consumers the milk of such other milk dealers at a price one cent less per quart than such stores are permitted to sell the bottled milk of the plaintiff under its trade name "Borden's". To the best of deponent's information and belief all such stores do in fact sell the bottled milk of such other licensed milk dealers at the said differential of one cent per quart. In consequence of this one cent preference enjoyed by such other milk dealers the business of the plaintiff is

being continuously and seriously impaired. Many of its store customers have been lost to it and many others have materially decreased their daily purchases of bottled milk from the plaintiff. The deponent is informed and believes that this situation is due solely to the aforesaid arbitrary and unjust differential. Investigations made by the plain- [fol. 78] tiff from time to time during the last nine months show that the loss of many of the plaintiff's store customers and the greatly decreased sales of the plaintiff to many other of the plaintiff's store customers are due solely to the unfair competitive disadvantage forced upon the plaintiff by reason of the one cent differential. Moreover, the one cent differential has deprived the plaintiff of a substantial portion of its house to house delivery business There is no differential in house to house delivery business between advertised and unadvertised trade names. However, under the Agriculture and Markets Law and the Orders of the Commissioner stores are enabled to sell the plaintiff's milk to consumers without delivery at one cent per quart less than the plaintiff can make such sales with delivery. Furthermore, because of the one cent differential between advertised and unadvertised trade names stores can sell to consumers without delivery milk in bottles of many brands at two cents per quart less than the plaintiff can sell its milk to consumers with delivery. Normally, the consumer who stops having his milk delivered and goes to the store to purchase it without delivery, does so because he wishes to cut the cost of his milk. Naturally, in such cases it normally happens that the consumer when he goes to the store purchases the cheapest milk available to him and thus the plaintiff is deprived of this business.

11. That the provisions of Section 258-q of the said Article 21-A quoted in paragraph Nineteenth of the complaint are arbitrary, unreasonable, oppressive and discriminatory and have no relation to the protection of the public health or the public welfare, and the plaintiff has been informed by its counsel, Messrs. Milbank, Tweed Hope & Webb, that the said provisions are unconstitutional, illegal and void and are in violation of the Fourteenth Amendment to the Constitution of the United States in that they deprive the plaintiff of i-s property without due process of law and in that they deny the plaintiff the equal protection of the laws.

12. That on or about April 24, 1934, the plaintiff received from the Commissioner of Agriculture the application blanks required by him to be filed in his office as a prere- [fol. 79] quisite to the issuance of the necessary licenses to the plaintiff to carry on its business as a milk dealer. Promptly thereafter the plaintiff, through its said counsel, advised the Commissioner of Agriculture and Markets and the Director of the Division of Milk Control of the Department of Agriculture and Markets through their counsel, Henry S. Manley, Esq., that in view of the said one cent differential the plaintiff could not subscribe to the provisions in the applications that it would obey all provisions of the said Milk Control Law and of all orders made thereunder. On April 25, 1934, the defendants, through their said counsel, delivered to the said counsel for the plaintiff a letter, a copy of which is annexed hereto and marked "Exhibit 1" and made a part hereof.

13. That upon the receipt of this letter the plaintiff was faced with four alternatives: (a) it could fail to apply for the licenses, in which case it would lose its right to sell milk in the City and State of New York; or (b) it could violate the provisions of the statute and the orders made thereunder providing for the one cent differential, in which case it would be liable to severe and cumulative criminal and civil penalties; or (c) it could comply with and obey the said provisions providing for the one cent differential, in which case it would lose daily an increasing percentage of its sales of bottled milk. Each of these alternatives presented to the plaintiff the certain prospect of immediate and irreparable loss, damage and injury.

14. The fourth and only remaining alternative was that referred to by counsel for the said defendants in the said letter of April 25, 1934 (Exhibit 1), namely, to commence an action to determine the constitutionality and validity of the provisions of the statute and orders providing for the one cent differential. Even this alternative affords no protection to the plaintiff unless on or before April 30, 1934, a temporary restraining order shall issue out of this Court enjoining and restraining the defendants in the manner prayed for in the complaint.

Wherefore, the deponent respectfully prays that pending the hearing and determination of the application for an [fol. 80] interlocutory injunction the plaintiff have the pro-

tection of a temporary restraining order and that upon such hearing the interlocutory injunction prayed for in the said complaint be granted.

John F. Watson.

Sworn to before me this 26th day of April, 1934. Pearl E. Loeber, Notary Public, Kings County. Kings Co. Clk. No. 346, Reg. No. 5013. N. Y. Co. Clk. No. 59, Reg. No. 5-L-41. Bronx Co. Clk. No. 9, Reg. No. 28-L-35. Queens Co. Clk. No. 1342, Reg. No. 5303. Certificates filed in Westchester, Richmond, Nassau & Suffolk Counties. Commission expires March 30, 1935. (Seal.)

[fol. 81] EXHIBIT 1 TO AFFIDAVIT

State of New York

Department of Agriculture and Markets, Milk Control Board, 80 Centre Street, New York City

Charles H. Baldwin, Commissioner of Agriculture and Markets

Thomas Parran, Jr., Commissioner of Health

Kenneth F. Fee, Director

April 25, 1934.

Milbank, Tweed, Hope & Webb, 15 Broad Street, New York City:

Attention of Mr. Pfeiffer

Re Borden's Farm Products Co.

GENTLEMEN: I talked last night with Mr. Fee and today have talked by telephone with Commissioner Baldwin about the question which yesterday you presented to me orally.

It seems that your client questions the constitutionality of the "Unadvertised differential" provision of the 1934 Milk Control Law (Chapter 126 of 1934, Section 258-g, last sentence; formerly Chapter 158 of 1933, Section 317-c). It

may desire to challenge that provision in the Courts or by some course violative of the statute. The time has now come for filing an application for a license under the law, and you hesitate, under those circumstances, from having your client subscribe to the provision in the application that it will obey all provisions of the Milk Control Law and of all orders made under it. You fear that such a subscription on the part of your client may be regarded as a waiver or an estoppel, preventing it from asserting what you now claim under the constitution.

We do not see our way clear to relieve your client from that embarrassment relative to its application. We appre- [fols. 82-88] ciate that your client cannot very well carry on its large business without a license, particularly in view of the first two sentences of Section 257. Having sworn to uphold the constitution we have no wish to withhold a license for any reason which is not constitutionally valid, and neither have we any desire that your client procure a license by waiver of any constitutional right. Nevertheless, if your client is unwilling to sign an application agreeing to obey the provisions of the Milk Control Law, no license will be granted to it. If there is any serious difference between your client and the State as to the constitutional validity of any provision of the statute, that issue should be submitted to the Courts before entering upon a relationship which is likely to be interpreted as an engagement by your client to obey the statute as written, and an engagement by the Commissioner to enforce against your client the statute as written, at least in the absence of adjudication running against its language.

You also expressed some interest in the course which the Commissioner will pursue if your client attempts to violate the statute as a method of presenting the constitutional question. I cannot promise that our suit will be for an injunction under Section 258-e. It is quite possible that the Commissioner will avail himself of the civil penalty provisions of the Agriculture and Markets Law, and refer to the Attorney-General for collection against your client penalties based upon each separate bottle of milk sold and each other separate transaction in violation of the statute and the orders made under it. Similarly your client may be charged with a misdemeanor as to each such violation. I mention these things because I believe it is not proper or competent for a public official to waive in advance enforce-

ment provisions which the Legislature has made available. Your client must assert its constitutional claim by some appropriate course, or assume all of the risks involved.

Yours very truly, Henry S. Manley, Counsel.

HSM/DFP.

[fol. 89] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO BILL OF COMPLAINT—Filed May 5, 1934

Now comes the plaintiff in the above-entitled cause and, leave of the Court having been first obtained, amends its bill of complaint heretofore filed herein by amending paragraph Fifth thereof so that said paragraph shall read as follows:

"Fifth. The defendants, William C. Dodge, William F. X. Geoghan, Samuel J. Foley, Charles S. Colden and Thomas J. Walsh are the duly elected, qualified and acting District Attorneys of the Counties of New York, Kings, Bronx, Queens and Richmond, respectively, and are citizens and residents of the State of New York. The defendants, William C. Dodge and Samuel J. Foley, as District Attorneys as aforesaid, are residents of the Southern District of New York and maintain their respective offices for the regular conduct of their duties as such District Attorneys in the said District. The defendants, William F. X. Geoghan, Charles S. Colden and Thomas J. Walsh, as District Attorneys as aforesaid, are residents of the Eastern District of New York and maintain their respective offices for the regular conduct of their duties as such District Attorneys in the said District."

Milbank, Tweed, Hope & Webb, 15 Broad Street, New York, N. Y., Solicitors for the Plaintiff. Timothy N. Pfeiffer, of Counsel.

[fol. 90] *Duly sworn to by W. H. Marcussen. Jurat omitted in printing.*

[fol. 91] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS

Now come the defendants Charles H. Baldwin, Kenneth F. Fee and John J. Bennett, Jr., and move that the bill of complaint be dismissed for the reason and upon the ground that it appears upon the face of the bill of complaint that the facts stated therein are insufficient to constitute a cause of action in equity, and upon the further reason and ground that the statutory provision herein complained of is valid and constitutional.

Wherefore, for the reasons and upon the grounds aforesaid, the defendants named respectfully move this Court that the bill of complaint herein be dismissed.

Henry S. Manley, Counsel for the Department of Agriculture and Markets; John J. Bennett, Jr., Attorney General of the State of New York, Solicitors for the Defendants Above Named.

[fol. 92] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL AFFIDAVIT OF JOHN F. WATSON—Filed May 4, 1934

[fol. 93] UNITED STATES OF AMERICA,
State of New York,
Southern District of New York, ss:

John F. Watson, being duly sworn, deposes and says:

1. That he is a Vice President of Borden's Farm Products Company, Inc., the plaintiff in the above entitled action, and is authorized to make this affidavit, supplementing the affidavit sworn to by deponent on April 26, 1934, in support of the plaintiff's application for an interlocutory injunction.

[fol. 94] 2. That on April 30, 1934, the plaintiff filed with the Division of Milk Control of the Department of Agricul-

ture and Markets of the State of New York an application for a license as a milk dealer pursuant to Article 21 of the Agriculture and Markets Law of the said State on the form supplied for the purpose by the Commissioner, and tendered the sum of $5,000 in payment of the fee required for such license. In said application the plaintiff stated that it had complied with all rules, price fixing orders and other orders of the Milk Control Board, but refused to agree to comply with all rules, price fixing orders and other orders made by the Commissioner of Agriculture and Markets, the reasons for such refusal being set forth in a letter accompanying said application, a full, true and correct copy of which letter is annexed hereto and marked "Exhibit 1" and made a part hereof.

3. That on May 3, 1934, the plaintiff received from Kenneth F. Fee, as Director of the Division of Milk Control, a letter, dated May 2, 1934, notifying the plaintiff that its application for a license as a milk dealer had been rejected by reason of the plaintiff's said refusal to agree to comply with all rules, price fixing orders and other orders made by the Commissioner of Agriculture and Markets. A full, true and correct copy of said letter is annexed hereto and marked "Exhibit 2" and made a part hereof.

4. That in the City of New York alone the plaintiff sells bottled milk under its trade name "Borden's" in excess of 600,000 quarts daily, such sales involving over 300,000 separate transactions with individual stores and consumers. Under the provisions of Section 257 of Article 21 of the Agriculture and Markets Law (annexed to the bill of complaint as "Exhibit E") it is unlawful for the plaintiff to buy or sell or distribute milk unless the plaintiff shall have been licensed as provided in said Article 21, and unless protected by the order of this Court the plaintiff and its officers, agents and employees will be liable to the imposition of the penalties provided in Sections 39 and 40 of said Agriculture and Markets Law (annexed to the bill of com- [fol. 95] plaint as "Exhibit G") in an amount exceeding $60,000,000 each day by reason of the refusal of the Commissioner of Agriculture and Markets to issue to the plaintiff a license as aforesaid, and the plaintiff and its officers, agents and employees will be likewise liable to the imposition of fines and the plaintiff's officers, agents and em-

ployees will be liable to imprisonment pursuant to the provisions of Section 41 of said Law (annexed to the bill of complaint as "Exhibit H").

5. That milk dealers (including stores), their officers, agents and employees, who sell milk to or purchase milk from the plaintiff will be liable to similar penalties, fines and imprisonment unless they shall be protected by the order of this Court, and the plaintiff will be thereby unable to maintain and carry on its business as a milk dealer.

6. That of the bottled milk sold by the plaintiff under its trade name "Borden's" in the City of New York over 200,000 quarts daily are sold by the plaintiff to stores. Deponent is informed and verily believes that by reason of the one cent price differential in favor of milk dealers not classified as having well advertised trade names the sale of the plaintiff's bottled milk to stores has been impaired to the extent of at least 25,000 quarts daily. The resulting loss to the plaintiff may not be measured simply by deducting the plaintiff's current cost per quart of bottled milk from the current price received by the plaintiff upon the sale of such milk to stores and multiplying the resultant figure by 25,000 quarts which the plaintiff estimates that it is losing daily by reason of the one cent price differential. The actual loss to the plaintiff is considerably in excess of such a figure inasmuch as the costs of selling and distributing bottled milk depend in a large measure upon the volume of business. The plaintiff delivers its bottled milk to a large proportion of the 25,000 stores in the City of New York licensed to resell to consumers. (In deponent's affidavit verified April 26, 1934, it was stated that there were more than 40,000 such stores; deponent has since been informed and verily believes that at the present time the correct number is approximately 25,000.) The cost of de- [fol. 96] livering to a store customer a case of milk is very little greater than that of delivering to the same store customer a quart of milk. Thus in estimating the loss to the plaintiff resulting from the one cent price differential allowance must be made for the reduced operating costs upon the larger volume of business which the plaintiff would have in the absence of such differential.

7. That as set forth in paragraph 10 of deponent's affidavit verified April 26, 1934, the one cent price differential

has not only impaired the sale of the plaintiff's bottled milk to stores but also the sale to consumers in the plaintiff's house to house delivery business. Deponent is informed and verily believes that such house to house delivery business has been impaired to the extent of at least 50,000 quarts daily. As in the case of sales to stores, any estimate of the resulting loss to the plaintiff must make allowance for the reduced operating costs upon the larger volume of business which the plaintiff would have in the absence of such differential.

8. Deponent is informed and verily believes that of the total amount of bottled milk sold to stores and resold by stores to consumers not more than 35% is bottled milk which has been classified as having a well advertised trade name.

9. That by joint resolution of the Senate and Assembly of the State of New York adopted March 10, 1932, a joint legislative committee was created to investigate the causes of the decline of the price of milk to producers and the resultant effect of the low prices upon the dairy industry and the future supply of milk to the cities of the state; to investigate the cost of distribution of milk and its relation to prices paid to milk producers, to the end that the consumer might be assured of an adequate supply of milk at a reasonable price, both to producer and consumer.

10. That the said Committee, known as the Pitcher Committee after its Chairman, Perley A. Pitcher, made its "First Preliminary Report" on February 13, 1933. The said report made no recommendations and contained no [fol. 97] provisions with respect to permitting the sale of bottled milk not having a well advertised trade name at a price lower than that fixed for sales of bottled milk having a well advertised trade name, nor did it contain any findings which would afford any basis whatever for such differential.

11. That thereafter and on or about February 14, 1933, a bill was introduced in the New York Legislature by Senator Pitcher embodying the recommendations of the Pitcher Committee. The said bill as so introduced likewise contained no provisions relating to such price differential.

12. That in March 1934, the Milk Control Board of the State of New York made a report to the Governor and to the Legislature. The said report made no recommendations and contained no provisions with respect to the continuance of the price differential provided for in Subsection (c) of Section 317 of the Milk Control Law of 1933 as enacted by the Legislature (annexed to the bill of complaint as "Exhibit A"), nor did it contain any findings which would afford any basis whatever for such differential.

13. That thereafter and on or about March 15, 1934, a bill was introduced in the New York Legislature by Senator Pitcher embodying the recommendations of the Milk Control Board. The said bill contained no provisions relating to such price differential.

14. That deponent is informed and verily believes that in none of the reports which have been made to or by the Pitcher Committee or the Milk Control Board or the Commissioner of Agriculture and Markets has there been any indication that advertising is in any respect detrimental to the milk industry as a whole or to the producers, distributors or consumers of milk, and that no finding was submitted to the Legislature upon which there could be based a decision that the penalizing of milk dealers who advertised their product would benefit the milk industry or the producers, distributors or consumers of milk. That, on the contrary, the policy of the Legislature favors the ad- [fol. 98] vertising of milk is shown by the enactment by the Legislature on or about April 29, 1934 of a bill known as the Osterstag Bill providing for the expenditure by the Commissioner of Agriculture and Markets during the coming year of a substantial sum of money for the sole purpose of carrying on an advertising campaign to promote the sale of milk.

15. That deponent is informed and verily believes that in none of the several other states which have undertaken to control the production and distribution of milk has any attempt been made by statute or by any rule or order of the public officials charged with the enforcement of the statute to establish any price differential on the basis of advertising.

Thomas F. Watson.

Subscribed and sworn to before me this 3rd day of May, 1934. Edward H. Dare, Notary Public, Kings County. Certificate filed in New York County, Clerk's No. 48. New York County Register's No. 6-D-27. Commission expires March 30, 1936.

[fol. 99] EXHIBIT 1 TO SUPPLEMENTAL AFFIDAVIT

Borden's Farm Products Co., Inc., 110 Hudson Street, New York

Office of Francis R. Elliott, Assistant Secretary

April 28, 1934.

Charles H. Baldwin, Esq., Commissioner of Agriculture and Markets, Albany, N. Y.

DEAR SIR: We hand you herewith an application executed by us for a license to operate as a milk dealer together with our check to your order in the amount of $5,000 in payment of the requisite license fee.

We wish to call to your attention that we have answered in the negative question No. 35 of the application. We have given this negative answer to this question only because we are unwilling and unable to agree to comply with and obey the provisions of Article 21-A of the Agriculture and Markets Law and of Official Orders Nos. 12, 59 and 35 as amended by Official Order No. 59 in so far as such Articles and Official Orders authorize and permit the sale in bottles of fluid milk not having a well advertised trade name to stores and by stores to consumers at a price below that at which our fluid milk in bottles may be sold under our trade name "Borden's". We have been advised by our counsel that these provisions are unconstitutional, illegal, void and in violation of Section 6 of Article 1 of the Constitution of the State of New York and of the Fourteenth Amendment to the Constitution of the United States in that they deprive this Company of its property without due process of law and in that they deprive this Company of the equal protection of the laws. Our negative answer to the above question No. 35 is given solely for the above reason.

Very truly yours, Borden's Farm Products Company, Inc., by F. R. Elliott, Assistant Secretary.

[fols. 100 & 100a] EXHIBIT 2 TO SUPPLEMENTAL AFFIDAVIT

State of New York, Department of Agriculture and Markets, Charles H. Baldwin, Commissioner, Albany

Division of Milk Control, Kenneth F. Fee, Director

May 2, 1934.

Borden's Farm Products Co., Inc., 110 Hudson Street, New York, N. Y.

Attention Mr. Francis R. Elliott, Assistant Secretary

GENTLEMEN: This will acknowledge receipt of your letter of April 28 addressed to Commissioner Baldwin and with which you have enclosed the application of Borden's Farm Products Co. Inc. for a license under Article 21 of the Agriculture and Markets Law, and your check No. 188474 made payable to the order of the Commissioner of Agriculture and Markets in the sum of $5,000.

The obvious reason for the licensing of milk dealers is to secure compliance with the statute and with the regulations promulgated thereunder. Question No. 35 in the application for a license reads as follows: "Do you agree to comply with all rules, price fixing orders and other orders hereafter made by the Commissioner?" You have answered this question in the negative. Such being the case, we find it necessary to decline to issue the license for which you have applied.

We are returning your check No. 188474 in the sum of $5,000 herewith.

Inasmuch as this entire matter is now the subject of litigation, a copy of this letter is being sent to your attorneys in that case.

Very truly yours, Kenneth F. Fee, Director.

KFF: WG.

[fol. 101] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF W. H. MARCUSSEN—Filed May 4, 1934

[fol. 102] UNITED STATES OF AMERICA,
State of New York,
Southern District of New York, ss:

W. H. Marcussen, being duly sworn, deposes and says:

1. That he is a Vice President of Borden's Farm Products Company, Inc., the plaintiff in the above entitled action, and is authorized to make this affidavit in support of the plaintiff's application for an interlocutory injunction.

[fol. 103] 2. That on or about November 20, 1931, the Milk Commission of the Department of Health of New York City made a report recommending that the sale of milk in "loose" form to stores for resale to consumers should be forbidden. Prior to that time it had been the custom to sell milk to stores for resale to consumers in "loose" form as well as in bottles.

3. That the recommendations of this Commission were not made effective for some time by reason of the prevailing economic conditions and in order to give ample opportunity to milk dealers to accommodate their distribution machinery to the change. On June 1, 1933, there became effective an order of the Board of Health of New York City forbidding thereafter the sale of this so-called "loose" milk to stores for resale to consumers.

4. That the period from November 20, 1931 until June 1, 1933 was a period of transition during which milk dealers were increasing their sale of milk in bottles and preparing to discontinue the sale to customers of loose milk. As the sale of bottled milk increased, there developed intensive competition among all the milk dealers as each attempted to capture the new market for bottled milk, so that each would be in a position after June 1, 1933, to sell in bottled form as nearly as possible the same quantity of milk as it had previously sold in loose form.

5. That the plaintiff prior to June 1, 1933, had a very substantial business in the sale of loose milk. Like other

dealers (including both those who have now been classified as having a well advertised trade name and those who have not been so classified) the plaintiff underwent this transformation of its business to the bottled form.

6. That during all of this period, and for a long period prior thereto, plaintiff purchased milk from producers under what is known in the industry as the "classified price plan". Under this plan there were established separate prices applicable to the different types of uses to which milk might be put. At the end of each month the plaintiff [fol. 104] paid for the milk which it purchased a price based upon the ultimate use to which it put the milk.

7. That substantially all of plaintiff's milk requirements were obtained from Dairymen's League Co-operative Association, a co-operative association of dairy farmers. To this Association the plaintiff paid its total aggregate obligation under the classified price plan. Other milk manufacturers and milk dealers also purchased substantial quantities of milk from this Association. This Association paid to each individual member farmer a blended price representing the average price per quart received by the Association under the classified price plan.

8. That for the benefit of its member producers Dairymen's League Co-operative Association has endeavored to dispose to the greatest extent possible of surplus milk by selling this to various manufacturing purchasers. Since milk used in manufacturing is in the lowest price classification, this has resulted in the receipt of low prices for substantial portions of its milk. Since the blended price which this Association pays to its member producers is based upon the blend of all the sales made by it to all of its dealer customers, these sales to manufacturers have resulted in the members of the Association having received a blended price substantially lower than the highest classified price for fluid milk. As a return benefit the members of the Association have been enabled to dispose of all of their milk all of the time.

9. That a similar use of the classified price plan has been made by Sheffield Farms Company in its purchases from the Sheffield Producers Association, and that Association has similarly paid to its members a blended price.

10. That the smaller milk distributors, constituting plaintiff's competitors, and constituting a large proportion of those distributors who are today classified as not having well-advertised trade names, were not accustomed to purchase their milk from producers on the classified price plan and were not accustomed to take care of any substantial amount of surplus milk of those producers who sold to [fol. 105] them. It was their custom to estimate as accurately as they could their fluid milk requirements. They would acquire only the milk necessary for these requirements from producers by offering to them a price approximating the blended price received by the members of Dairymen's League Co-operative Association or the members of Sheffield Producers Association. Thus these dealers were able to purchase their fluid milk requirements at the blended price, whereas plaintiff was accustomed to purchase its fluid milk requirements at the highest classified price. This involved a greatly added cost burden to plaintiff.

11. That as the competition for sale of bottled milk increased, these independent milk dealers commenced to reduce the price of their bottled milk. They were able to do so by reason of their purchases of milk from producers at the lower price. To meet this decline in prices, plaintiff was forced to reduce its price for bottled milk. As a result, a general decline in price occurred. The result of this increasing competition was a continuously increasing decline of prices to consumers and to producers which rapidly produced chaos in the milk industry. It was because of this chaos that the Pitcher Committee was created to investigate the dairy industry, as a result of which the 1933 Milk Control Law was recommended to and adopted by the Legislature.

12. That this decline in prices which became a price war was concisely described by the Pitcher Committee in its first preliminary report promulgated by it just prior to the introduction into the New York Legislature of the 1933 Milk Control Law. In this report the Committee stated:

"(e) A satisfactory stabilization of prices for fluid milk requires (1) that the burden of surplus milk be shared equally by all producers and by all distributors in the milk

shed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor; (2) that all reasonable efforts be made to reduce the amount of the surplus to the minimum by adjusting the supply of milk more closely to the demand. Obviously the production of surplus milk in [fol. 106] most parts of New York State constitutes an economic loss, and is only justified to the amount necessary to guarantee a continuously adequate supply of fluid milk and cream in the available markets.

"(f) The fact that the larger distributors find it necessary to carry large quantities of surplus milk while the smaller distributors do not, leads to price-cutting and other forms of destructive competition, especially when the surplus is abnormally large. The small distributor can contract for his minimum requirements and depend upon emergency purchases when threatened with a shortage. The larger distributors cannot do this since the same percentage deficiency in volume would involve quantities too great to be obtained on short notice. The result of this situation is that the smaller distributors who take no responsibility for the surplus, by purchasing their milk on the basis of the blended returns by the larger organizations, are in a position to undersell the larger distributors in the cities.

"Most of the surplus in the New York milk shed is carried by the Dairymen's League and the Sheffield Farms Company. Other dealers by selling all or nearly all their supply as fluid milk have been able to engage very generally in price-cutting which has repeatedly forced the large retail distributors (Borden's and Sheffield Farms) to lower their prices so as to protect their business. Some means of control is urgently needed which will place all buyers of milk on an equal basis as to the cost of their milk which they purchase for sale in fluid form. Only in this way can prices be stabilized above the ruinous level of returns from butter and cheese, or the public be assured that the most efficient methods of distribution will prevail."

13. That during the period above described and prior to that period, there was at no time any customary and accepted difference in price between plaintiff's milk sold under its trade name "Borden's" and the milk of its competitors sold under trade names not now classified as well-

advertised trade names. In the price war above described there may have been periods when some of the dealers were selling their milk in bottles at a price below the plaintiff's price. If so, this was because of plaintiff's determined [fol. 107] effort to preserve the price structure and to prevent the growing chaotic condition. Plaintiff was, however, accustomed from time to time to adjust its price and was forced to adjust its price to meet this type of competition.

14. That the 1933 and 1934 Milk Control Laws stabilized the situation in all respects except for the insertion each year by amendment in the Legislature of the provision recommended neither by the Pitcher Committee nor by the Milk Control Board for the one cent differential. The law has stabilized the situation in all other respects. All milk dealers under the Milk Control Laws have been required to pay to producers on the classified price plan. All dealers must pay to producers the top bracket price for fluid milk. The price which must be paid to producers by plaintiff is identical to the price which must be paid to producers by those dealers who are not classified as having well-advertised trade names. The price to consumers for door to door delivered milk is the same for the milk of the plaintiff as it is for the milk of those dealers not having well-advertised trade names. The price at which plaintiff sells its milk to stores and at which stores sell their milk to consumers throughout the entirety of New York State with the sole exception of New York City is the same as the price for plaintiff's competitors without well-advertised trade names. The one cent differential is the sole remaining evidence of the price discriminations prevailing during the price war.

15. That there is in effect in the State of New Jersey a milk control law substantially similar to the Milk Control Law in effect in New York State. That the New Jersey law does not have any provision for the one cent differential. That there is also in effect in the State of Connecticut a similar milk control law, but with no one cent price differential. Plaintiff does business in each of these states and in various cities in New York State outside of New York City. In none of these places has the absence of the one cent differential destroyed the business of smaller independent milk dealers. These dealers have

been able to continue their business in its normal competitive field. The only difference in these states and in the remainder of New York State is that the smaller dealers [fol. 108] have not had the unfair competitive advantage of the one cent differential, and so have not been able to greatly expand their markets.

16. As estimated by the Pitcher Committee in its report which was the basis for the 1933 Milk Control Law, there were on April 1, 1930, 83,891 farmers engaged in the production of milk for commercial use in New York State as reported by the 1930 census. Of this total at least 31,000 were members of Dairymen's League Co-operative Association, and 9,500 were members of Sheffield Producers Association. Of the remaining approximately 43,400 independent producers in this state, approximately 5,000 do not sell milk to New York City but sell it to various cities and towns in other portions of the state; another 3,500 sell all or a considerable portion of their milk for consumption outside of the state.

W. H. Marcussen.

Sworn to before me this 4th day of May, 1934. Pearl E. Loeber, Notary Public, Kings County. Kings Co. Clk. No. 346, Reg. N. 5013. N. Y. Co. Clk. No. 59, Reg. No. 5-L-41. Bronx Co. Clk. No. 9, Reg. No. 28-L-35. Queens Co. Clk. No. 1342, Reg. No. 5303. Certificates filed in Westchester, Richmond, Nassau & Suffolk Counties. Commission expires March 30, 1935. (Seal.)

[fol. 109] In United States District Court

[Title omitted]

Answering Affidavit of Henry S. Manley—Filed May 8, 1934

United States of America,
State of New York,
Northern District of New York:

Henry S. Manley, being duly sworn, deposes and says:

1. I am Counsel for the Department of Agriculture and Markets. In that official position I am solicitor or attorney

herein for the defendants Charles H. Baldwin and Kenneth F. Fee, and by request of Attorney General Bennett appear for him also.

2. I have held that official position for the past two years and more, and among my other duties have acted as counsel for the Milk Control Board. I have direct knowledge of the matters hereinafter referred as completely as any one person, and because of that fact, and notwithstanding my professional relationship to this litigation, I make this affidavit.

[fol. 110] 3. The purpose of the "unadvertised differential" provision in the 1933 Milk Control Law, and its purpose in the 1934 law, is to safeguard against monopoly. This is merely my conclusion from the data hereinafter referred to, and is to be given no weight except insofar as it is warranted by allegations of fact.

4. Legislative Document of 1933 Number 114, known also as the "Pitcher Report", shows that in New York State for a number of years before the report there had been a tendency for the number of milk distributors to decrease and a few companies to emerge as the dominant factors in each market (pages 165, 180). In New York City three companies handled approximately two-thirds of the total milk supply (page 165). In upstate cities the three largest companies averaged about 40 percent (page 165). A very large percentage of retail business in New York City was controlled by Borden's Farm Products Company and Sheffield Farms Company (page 166). There had been some recent tendency to increase distributors, but "these conditions probably are temporary and the trend toward fewer and larger distributing units may be expected to continue with the return of more normal conditions in this industry" (page 167). The larger units had tended to organize through holding companies on a national scale (pages 173-179). In the past the milk industry in New York State had shown strong monopolistic tendencies (pages 100-101, 299; see also People v. Milk Exchange, 145 N. Y. 267). The situation as to monopolistic tendencies was summarized as follows at page 20 in the Pitcher Report:

"At present competition in the business of milk distribution in most cities of the state is keen to the point of being wasteful and destructive. On the other hand, there has

been over a period of years a marked tendency toward fewer and larger distributors. This tendency, though temporarily interrupted by unusual conditions, may be expected to continue when conditions are again stabilized."
[fol. 111] "In the past ten years large corporations have developed, embracing numerous subsidiary companies engaged in the handling and distribution of dairy products. The two largest of these corporations, having vast resources and widely scattered operations, play an important part in the handling of milk produced in this state."

5. The same report showed that there was a wide variation in the prices at which milk was sold to stores in New York City and in their retail price to consumers (pages 95, 259-261). At page 253 the report said:

"It is common knowledge that the two large companies make relatively fewer concessions from established sales prices than do the smaller distributors. The principal reason for this difference is that their milk is sold under well known brands or trade names which have come to signify extra value in quality and service. Stores find it to their advantage to carry these brands of milk because they are so often called for by the customers."

6. To the best of my information and belief there is no record of any debate or discussion before the Legislature or any committee relative to the addition of the "unadvertised differential" provision to the bill which became the 1933 Milk Control Law.

7. After the enactment of the 1933 Milk Control Law, containing the "unadvertised differential" provision, there was complete agreement in the industry that Bordens and Sheffield were intended to be classified as "advertised" companies. The case of Dairymens League was regarded as less certain, but it was added to the list upon its own request and upon request of some of its competitors. M. H. Renken Company also asked to be added to the list. The four companies named, and no others, were so classified. No dissatisfaction with that classification was expressed to the Milk Control Board by any milk dealer during the year 1933.

[fol. 112] 8. On April 19, 1933, I had occasion to request an opinion of the Attorney General as to whether the Board

had power to make the "unadvertised differential" applicable to sales from stores to consumers, and he answered in the affirmative. In my opinion that correspondence is not helpful for present purposes, but it is referred to because my opinion may be erroneous.

9. The "unadvertised differential" provision has been effective from April 17, 1933 (the effective date of the earliest price order of the Board) until the present time; except that the "advertised" dealers were not specified by the Board until May 5, and except that from January 30, 1934, until April 9, 1934, there was no specific minimum price applicable to sales of milk in New York City from milk dealers to stores.

10. From time to time milk dealers selling at the "unadvertised" price complained that they were being subjected to losses, and should have a greater "spread". The courts entertained two suits for relief from such losses. Hegeman Farms Corporation (decision of this Court, March 16, 1934) was one of those cases; the Dellwood-Rosasco suit (150 Misc. 762) was another. These suits and some observations by Dr. Leland Spencer in his report of April 16, 1934 (see table at page 6, also page 13) illustrate the practical difficulties which the "unadvertised differential" put in the way of price-fixing. Dr. Spencer concluded that under the established prices "unadvertised" dealers were subjected to losses, and said:

"Furthermore it is clear that any schedule of prices which would permit a normal rate of profit to dealers who specialize in unadvertised brands of bottled milk sold at a lower price would result in abnormally large profits to other groups of dealers."

[fol. 113] 11. The bill which later became the 1934 Milk Control Law was introduced on or about March 15, 1934, and contained no reference to an "unadvertised differential." On March 23 a public hearing was held on the bill. Exhibit A hereto annexed is a true, and I believe complete, summary of such parts of that hearing as related to the "unadvertised differential" provision. As appears therefrom, several small dealers insisted that without it they could not continue to compete with the large or "advertised" companies. The provision which now is the last sentence of section 258-q was added by an amendment on

or about March 26, excepting the words "and such lower price shall also apply on sales from stores to consumers", which were added very shortly before passage in the Senate on March 28. On March 26 there was also added the last sentence now found in section 258-m, subsection 1, b.

12. The Legislature in 1933 and also in 1934 had before it facts from which it might reasonably have concluded that if all milk dealers selling to stores in New York City were required to sell at the same minimum price the result would have been elimination from business of all but the three largest dealers, which were also the three having brands of milk best known and most widely advertised. Apparently it regarded that result as against the public interest and sought to avoid it by the provision now in litigation, which tends to protect unadvertised dealers against loss of volume, even at the risk that the same result (monopoly) may eventually come about from their doing a favorable volume of business on a narrowed and unfavorable "spread".

13. It is respectfully submitted that the provision is in- [fol. 114] tended as a safeguard against monopoly. Its wisdom is open to question but it is not so clearly unreasonable or arbitrary as to be unconstitutional.

Henry S. Manley.

Sworn to before me this 7th day of May, 1934. Mary E. McAuliffe, Notary Public.

[fol. 115] EXHIBIT "A" TO AFFIDAVIT OF HENRY S. MANLY

On March 23, 1934, there was held in the Assembly Chamber, Albany, a joint hearing before the Senate and Assembly Committees on Agriculture, relative to the bill by Senator Pitcher which later in amended form became Chapter 126 of the Laws of 1934. Senator William J. Byrne presided, and a stenographic transcript was made, which consists of 234 pages. The bill pending at that time omitted the "Unadvertised differential" provision.

Dr. Shirley W. Wynne was the first witness, speaking as president of the largest organization of milk distributors in New York City, and at the conclusion of his remarks he said:

"There is one further matter that we wish to submit to your committees and that is the question of permitting unadvertised brands of milk to be sold at a cent less than the advertised brands, and I wish to say to you that there is a divergence of opinion amongst the members of the Institute on that point.

"Unfortunately we did not have sufficient time in order to poll the entire membership of the industry, but in the Legislative Committee, which met last week, there were four members of the independnt dealers in the city present. Two of them favored the continuation of the differential in price between advertised and unadvertised brands. The other two, also representing independent dealers, were in favor of eliminating that from the present law. So that I cannot speak for the Institute on that point, but must leave it to the individual members of the institute and of the industry to present their own case to you." (Pages 7, 8.)

Assemblyman Maurice A. Fitzgerald of the Fifth Queens County District made the following statement:

"Mr. Chairman, and Gentlemen of the Committees, the Pitcher-Bartholomew Bill by leaving out section 317-C of the Laws of 1933 will, in my opinion, increase the cost of milk distributed by independent dealers and sold through [fol. 116] retail stores to consumers in the City of New York by one cent per quart. There are approximately 1,600,000 quarts of such milk sold daily through these stores in New York City. If the Pitcher-Bartholomew Bill is adopted in its present form the increase in the cost of milk to the consumer in New York City will be $16,000 per day, or almost $6,000,000 per year.

"Since the well-off citizens usually have their milk delivered to their homes it will be readily seen that in the main the milk sold through the retail store is consumed by the poor. While there might be some slight justification of such a mulcting of the consumers of New York City if this huge sum was paid to the farmers, such is not the case. This extra money does not go to the farmer. It must be paid to the independent dealer distributor who is already paying milk control board prices to the farmer, and this in spite of the fact that the independent dealer is not asking for this increase. If the Pitcher-Bartholomew

Bill is to be adopted at all it should be amended by adding a provision such as that contained in the present law which authorizes the independent dealer to sell milk to the retail stores at a price one cent below the price fixed for advertised brands." (Pages 47, 48.)

Edmund F. Cooke of Buffalo made a statement in part as follows, on behalf of the Conesus Milk Producers' Association:

"As I have said, on page 27, line 26, after "period" I would insert this, and this is taken from the old bill, and I believe as a matter of justice to the independent distributors and producers you must insert it in this bill: "It shall not be unlawful for any milk dealer who has been continuously engaged for the past five years in the business of purchasing and handling milk, not having an advertised and well established trade name, in a city of more than one million inhabitants to sell to stores in such city at a price not more than one cent per quart under the minimum price fixed by the board for sales to stores in such a city; and the price to be charged by stores to consumers shall be fixed by the board accordingly." That restores the advertised and unadvertised brands of milk." (Pages 106, 107.)

Dr. Thomas Parran, Jr., then a member of the Milk Control Board, made a statement in part as follows:

[fol. 117] "The Board did not make any recommendations concerning the unadvertised brands in New York City. So far as I know, the Board as such has no very fixed opinion on that question as to whether or not unadvertised brands should be permitted to be sold at a lower price. Any way you look at it some of these independent dealers are in for a hard time. If they sell at a price of one cent less than the advertised brands, either they lose money or the large company makes too much money, assuming equal efficiency. If they are required to charge the same price, some of these independent dealers say the public will favor the brand of milk which is widely known and widely advertised. I do think it is a very difficult question to decide.

"The problem has arisen because in the past certain of these independent distributors have been able to buy milk to be sold almost entirely in the fluid market at a blended

or pooled price. Now that they are required to pay a price depending upon the utilization of that milk, they find themselves unable to do it. It has been a difficult problem for the Board to know where to set this dealer spread. If you will recall the report of Dr. Spencer showed that of thirty milk distributing companies in New York City, only, if I recall the figures, about six made a profit. Those six included all of the larger ones. Whether it is the volume of milk or the greater efficiency of their business or what, I am not prepared to say at this time, but it does appear that no matter where a schedule of prices is set, either it must guarantee a profit to the less efficient milk distributor or it must put out of business some of those milk distributors.

"Another point, Mr. Chairman, is that during the past year because of the temporary nature of this law the Milk Control Board has not been able to bring about any radical increases in efficiency in this industry. Obviously, because of the uncertainty as to constitutionality and because of the temporary nature of the law, it has not been possible to force, shall I say, reformations in the interest of efficiency both in the country business and the city end, and I would subscribe fully to the statement that Mr. Manley is quoted as saying to the effect that both we have too many country plants and too many milk distributors.

"All of you know that a milk plant in the past has been started in a city and a competitor immediately has gone in and put up another plant when one plant could do the busi- [fol. 118] ness and could do the business just as well.

"I mention that because it has a bearing on this question of permanent increases in efficiency. We are not going to get a better price for farmers by squeezing the dealer spread much more. The only way we can get better prices for farmers is higher prices to consumers and increased efficiency in the business itself, both in the country and the city end. I hope in the future that such increases in efficiency can be brought about." (Pages 112, 113, 114.)

Hugh W. Taylor, secretary of a milk dealers' organization in New York City, made a statement in part as follows:

"May I say that the purpose of my talk has something to do, not so much with what is in the bill but with what is

not within the bill, and I refer to the question of the sale of unadvertised brands of milk in New York City. May I say for your information and for the information of your committees that the very life blood of the independent dealers of New York City depends entirely upon the continuation of that provision in last year's bill." (Page 121.)

William J. McKay, president of three milk companies doing business in New York City, made a statement as follows:

"There is a great deal of misunderstanding on this matter of advertised and unadvertised brands of milk in the City of New York.

"I want to say first that it is the only place that I know of in the United States where they brand an equal grade of milk as an advertised and unadvertised brand, forcing the small dealer that may not be that fortunate as to have had a business large enough to advertise his milk, to sell his milk at a reduced price for which the mother of the children in purchasing that immediately says to herself, it is an inferior article.

"I have a short brief here that I would like to read, in which are records that can be easily determined from the record that was made by Dr. Spencer.

"The following detailed statement of the cost and expense on a bottle of milk will prove what our experience has been since June 1, 1933. It is not only impossible to [fol. 119] make a profit at unadvertised brand prices, but it is obvious losses have been sustained each month since the establishment of the selling prices on the unadvertised brand of bottle milk.

"Using the base price for 3.5 per cent milk for February, 1934, as set up by the Milk Control Board, the following shows the cost of a quart of bottled milk delivered to stores or restaurants:

"100 pounds of 3.5 per cent milk at the Control Board's No. 1 price, $2.175 per hundred weight. Our average test of 3.6 milk, which makes a plus of six cents per hundred weight, gives us a total cost paid producer of $2.235, to which we have got to add our creamery handling expense of 20 cents per hundred, our freight to New York City of .455 cents per hundred weight, our hauling from the railroad terminal at New York City to our pasteurizing plant

of 6 cents per hundred weight, making a total cost of 100 pounds of milk $2.95 per hundred weight f. o. b. our plant in New York City.

"Reduced to a quart of milk this cost is 6.268 cents, or substantially 6¼ cents per quart.

"Our city expenses which have got to be borne by this, our bottling and pasteurizing, one cent per quart, our delivery and selling is .0253. Our administration and overhead is .005, making a total of 10.298 cents per quart for a bottle of milk.

"Data obtained from several other milk companies shows a total city expense including bottling, pasteurizing and delivery of over four cents per quart. Dr. Leland Spencer's report covering many milk concerns will substantiate this figure. Our costs therefore show that we are operating with reasonable efficiency and economy.

"It is obvious that even at the advertised brand selling price of ten cents a quart, there is still a loss.

"Now, we did not become involved in this losing proposition voluntarily. Prior to the time the Milk Control Board issued its first price orders, we sold to stores at the same price as the Borden and Sheffield companies. However, with the issuance of that order, in which Borden's, Sheffield Farms, the Dairymen's League and Renken [fol. 120] Dairy Company, were named specifically as the "advertised brands", our competitors promptly announced their milk would be sold at one cent per quart less than the price fixed by the Control Board for a quart of advertised milk. No effort was made by them to get the advertised brand price. In consequence, storekeepers demanded of us similar concessions, and being a relatively small company, we were forced to get in line and sell our product, equal in quality in every way with the best of the so-called advertised brands at the unadvertised competitive price.

"Thus, against our best judgment, we have been forced into a position of taking continuous losses, or the alternative of losing our business to those who by law are permitted to sell at one cent less than the price fixed by the Board.

"Our only hope for relief from this situation would be for the Board to fix the price to the farmer and the selling price in the city so that the distributor of unadvertised brands could make a living and a reasonable profit. Since

this would mean an out-of-hand gift of one cent per quart additional profit to the immense volume of advertised brand milk, it would appear that this prospect of relief is nothing more than a vision quite unlikely to be realized.

"They said with this definite reality of costs exceeding returns, the only other avenue of escape is to seek cheaper milk, either by direct violation of the Board's orders in territories under its jurisdiction or taking on a supply outside the State and beyond the jurisdiction of the Board at lower than fixed prices.

"From the large number of such violations prosecuted by the Board, some having reached the stage of permit revocation and court action, it would appear such methods were resorted to with more than occasional frequency.

"I am of the candid opinion that such efforts at self-preservation, resulting because many dealers elected to sell their milk at one cent per quart below the price fixed by the Board and for which legal sanction exists in the present law, was the major cause of whatever failure of enforcement existed during the past year.

"For that reason, as well as the losses sustained through having to meet an unsound, uneconomic competition, I am [fol. 121] opposed to the reenactment of the existing "unadvertised brand" provision. A continuation of the present uneconomic arrangement is heading many distributing concerns directly into bankruptcy.

"The records here are records that are already filed with Dr. Spencer in Albany. The records of three companies that I happen to represent. There are records of many other companies in here that will seek, foolishly, I will say, seek to retain themselves in a business that they have got to absolutely cheat or disobey the laws of the Board which we are all trying so hard to uphold, or go outside of the State of New York for their product that they are going to sell, because there is no possible chance of anybody showing a figure within lines that can reduce that cost to where you can sell a bottle of unadvertised brand of milk in New York City at a profit.

"Furthermore I want to say this, that this scare of selling unadvertised brand milk was never in there in the time when we were selling canned milk in New York City. We have sold canned milk for years and years down there. We always retained or got the same price on our canned milk

that Borden and Sheffield got for theirs. We had the same grade of milk. It was a scare that went among the small dealers, that they felt that they were going to lose all their business. I am not afraid that I am going to lose my business unless the State of New York continues to brand my milk as an inferior product." (Pages 129-135.)

Julius Marcus, a milk dealer of New York City (described in the report as William Marcus) of 704 E. 133rd St., made a statement in part as follows:

"Now in the recommendations (of the Milk Control Board) I have noticed no comment mentioned of the law of last year, which is section 317, subdivision C, which should be taken out, and that is the advertised and unadvertised price for milk. In order to go into that, gentlemen, I must tell you a little bit of the history of our milk business.

"We sell to stores and to stores only. Prior to June 1, [fol. 122] 1933, we were selling loose milk to those stores and women of New York City who cannot afford their milk to be delivered to their boudoirs came down with pails and took this milk home.

"Then too the laws of the City, of the Health Department of the City of New York, abolished loose milk because in the mind of our Commissioner Wynne, at that time loose milk was a public hazard, and they put us into the bottled milk business. So we are in and have been in the bottled milk business since June 1, 1933, which is only about eight or nine months.

"Now, during that time when we sold loose milk the poor consuming public in New York City has paid for this milk four cents per quart less than the bottled milk price. If loose milk was sold in New York City for ten cents a quart the bottled milk delivered at home was 14 cents a quart. When the bottled milk came out at first we didn't get a chance to sell it. In order to introduce it to the public we gave it away and the checks that we paid to producers will easily verify that.

"Then the Control Board was created and they fixed a price of bottled milk to stores and then to consumers, and you gentlemen at that time saw fit to put in that clause that the unadvertised brands should be one cent less than the advertised.

"Now, let's follow that out. If a woman is good enough to come down every morning and pay three cents deposit on a bottle of milk, I think in my opinion she should pay two cents less. I think we have plenty of poor people in New York City who need that milk and will probably go without it if you increase the price.

"Now, let's see what would happen if you took that away from us. From experience that I have known in New York City I will quote now what happened with the Dairymen's League who extensively advertised a brand of milk for a period of years in New York City and they were selling to stores only and at a time when this Control Board sent out its first orders they found after spending millions of dollars for advertising purposes that they could not sell Dairylea milk and they substituted with an unadvertised brand in Manhattan and the Bronx, so-called Biggs Dairy milk, for a cent less, and in Brooklyn Delancey milk, which [fol. 123] shows that they haven't had a chance, or there wasn't time enough to advertise that milk to sell it to the public in New York City.

"What else is going to happen? You are going to put on us the same price. The first thing we will show you that we will try to retain our business and thereby you will make criminals out of us because we will have to undersell to the storekeeper in order to push our milk. You know that the large companies in New York City, and I know some of you gentlemen who come from New York, when you talk milk all you hear is Sheffield and Borden's. The big companies spend thousands of dollars on the radio. I know I have got a little boy seven years old that listens to Uncle Don every night for a half hour, and he comes back and says to me: "Daddy, why don't they mention Municipal Farms milk?" Because he thinks there is nothing else but Borden's. I can't afford to do that, and none of us can afford to do that, and I will tell you why we cannot afford it. First of all when the change came from loose milk to bottled milk we were not equipped to handle bottled milk. We sold milk in 40 quart cans. The public didn't know we were in existence at all. She bought milk. It was a quart of milk. They didn't know whether it was mine or anybody else's. Now, we introduce a bottled milk and they see new names that were never heard of before, they didn't know they were in existence, and with the extensive campaign of

advertising that the big companies did, it will take us at least another year to put a foot into the stores so that they ask for some of our milk.

"Now, we go back. One of the speakers here, I believe it was Mr. McKay, stated that the only way we can stay in business is to cheat, because we sell for a cent less. If you gentlemen will go into the Control Board, and I believe you have got three honest gentlemen there, they will show you that the best prices paid to producers were through the independent dealers who did sell for a cent less. I don't say that all of them are angels and 100 per cent. honest, but I will say that the majority are honest and you will find in every bunch of dealers, regardless of whether it is milk or anything else, you will find some decent ones and some not decent ones. It is up to you gentlemen in creating this law to make them all decent.

"Now, if you are going to pass this law and leave us in the lurch the next thing will happen. If the difference in [fol. 124] price between the store and upstairs will only be one cent, and maybe through their influence they will make it equal, there will be no initiative for a woman to go down to the store and buy milk. Our sales will drop heavily. Our expenses and our business is geared up to the extent where we are running it today also at a loss and you can prove that by the figures of Dr. Leland Spencer's report. You are going to put us clean out of business.

"Let us go*t* a step further on the price question. In every recommendation that we come up from New York at public hearings held by the New York State Control Board, and some of the gentlemen are here, you can verify it, we never recommended a lesser price for class 1 milk, which is for fluid consumption, than that of the big fellows. So that we are satisfied to work at a little margin and stay in business.

"Furthermore, we are not over-capitalized. You just look at me. I am the president and chief cook and bottle washer, and I run a business, and I have no stock holders that demand dividends or reports from me. Whatever I don't do for myself, nobody does it for me, and while I am up here in Albany the business is just free.

"I want to further state that we, the independent dealers, employ union labor in New York City, that which the big companies, including Mr. McKay who spoke here before,

can't brag about, but I do. We pay the best wages obtainable for milk drivers in any state in the Union. Our men will go home with $50 per week salary and six days a week and two weeks' vacation with pay, and we want to continue. If you put us out of business our routes will be absorbed by the big companies who are very well equipped to do so without adding on a man, and we and those that we employ, which amounts to a few thousand people, are just going to go begging, and by God, you don't want to start something like that now.

"In addition to that I want to mention another fact. We are not asking this legislation to last forever. By that I mean the unadvertised price, but I just ask for another year. Give us a chance. We will try and advertise as little as we can. Let us get a little bit known among the trade, and I hope you will do it. So next year if you take it away from us we will say we had our fair chance and will be pleased.

"Now, there is another thing I want to mention here, and that is this, that while the previous speaker, Mr. McKay, [fol. 125] was talking of cheating, and I want to tell you it hurts when you call a brother milk man a cheat, because you wouldn't like anybody to call any of you men or one of you men a cheat, because it reflects on the whole proposition. I don't think that he is so-called close to 100 per cent. He brought in milk from Vermont and didn't pay regulation prices, in my opinion. I didn't come to brag about it or complain, but when a man has a healthy pocket and has money to advertise, and furthermore, he has got a retail business, where do you think the store business, after you take it away from me, will go? Partly to him, because he delivers retail. We haven't any retail business, and I speak for those men that haven't any retail business. It will be absorbed by the big companies. It will put out the independent producer from our plant because we wouldn't be able to handle his products. Than what? Again the mercy of the big three to do with them whatever they damn please as it was shown prior to the enactment of this Pitcher Bill.

"Now, it is up to the producer to help us in this fight, and I hope the gentlemen of this Committee will realize that you take in a bunch of innocent dealers, most of us honest-to-goodness, hard working men, nothing fancy about us, except we try to live in this community and try to be loyal,

law abiding citizens, and if you don't give us that provision you will make quiet criminals out of us, because to retain our business we will have to do the things that we want to do openly, behind your backs, and I don't think this Committee wants to see that.

"Now, I beg of you, gentlemen, give us a chance for another year. If I live next year I won't ask for it. See that we get a fair chance to stay in business once more." (Pages 143-151.)

Mr. Irwin Kotcher, a milk dealer from 725 Fifty-second St., Brooklyn, made a statement in part as follows:

"Right in this man's district, this man sitting right here, 90 per cent of the milk being used is unadvertised. There is at present a 22 per cent reduction in the sale of milk in his district. I sell milk there. I have the record for it. And if we put in advertised, they can't buy it now, and we raise them another cent,—a good many more will have to stay without milk. Is that a policy to be followed right now? Is that what we are facing?

[fol. 126] "We are buying milk in New York State and we can sell it a cent cheaper. We have no hundred thousand dollar salaries. We have no inter-plant shipments that in the record show it cost about half a cent to ship from one plant. We are satisfied with what we have got and if we can handle it economically in those plants, all right. But that is nothing. They say we have no national concern with a view of what is happening in St. Louis and Mississippi and California. Our interest lies right here. We can make friends with our farmers upstate. I don't think I have an enemy upstate amongst the farmers, and I happen to be a distributor. I don't have to tell you what the distributor is to the farmer. That is human nature. But I don't believe I have an enemy. If there is one in the hall, let him say so, amongst the producers. And our company isn't doing any better than the reputable independent. We have paid 40 to 50 cents at least a hundred more than some others that sold advertised, and still we didn't come up crying about it. We were losing money; we admit it; we had our nose on the grindstone, but are we led to infer that while we lost money the impression was cast here that others made money. If such is the case, then there should be no unadvertised milk. The farmer is paying for it, but let's look again at the record.

"Chairman Byrne: You favor the bill as it is, retaining that provision?

"Mr. Kotcher: Yes, and strengthening it. We have some minor improvements, but make it as strong as possible; it is the best thing we could have had.

"Chairman Byrne: The cent differential, I mean.

"Mr. Kotcher: Yes. Now, there has been an impression cast that the farmer is paying our unadvertised brand. I was on committees a half a dozen times before the Control Board with different people from the larger companies. We claimed we lost money and they claimed they lost money. The Sheffield Company, I have their brief home by their main man who handles that; the Borden Company claimed they lost money; the Dairymen's League was along with us and we were there, and we all proportionately lost money but we didn't lose any more than they did proportionately. We were all in a box. But let's not infer that we are selling that milk, unadvertised milk, at the expense of the farmer. We are ready to meet him. Put the price out regardless of what it is that is fair. We will pay it. Let all pay it, big or small, independent or cooperative, and [fol. 127] we can ride along and live. All that we ask is a square deal for the independent distributor. We are being legislated out of business. Last year we had the same thing. The Big Three opposed us. We had it out. We found it was equitable. It was enacted in the law. It isn't our fault.

"Chairman Byrne: And you want it to stay there?

"Mr. Kotcher: We want it to stay there, and we feel we are absolutely justified in having it stay there.

"There are a lot of other things I could go into but the main thing is, we are just, it is coming to us, and not for one year, as my colleague here said a moment ago. If we can go ahead and pay the price and continue paying the price, satisfying our farmers, and they are satisfied, and we can economically deliver the milk in New York City at a cent cheaper, the poorest of the poor only gets that milk, why shouldn't they get it and why shouldn't milk be sold to protect two or three in New York City? No. We are not philanthropists. But we can do it. We are not out to become millionaires, but we can continue in business. I have been born in it; my father was in it, and there are men in the room that were born in it and can continue in it, and we have always continued, paid our

bills, and we want to pay our bills. All we ask is for a square deal.

"Chairman Byrne: And a continuance of last year's provision?

"Mr. Kotcher: Yes, section—I have it here, but it has been read into the record, continued in the bill." (Pages 167-171.)

A. C. Pilger, of the Conesus Milk Producers Association, described how that organization of farmers was evading the fixed price by leasing at an excessive rental the country plant from a New York City milk dealer selling at the unadvertised price. (Pages 173-181.) Incidentally he said:

"In regard to this advertised brand business, we are very much interested. I believe that any farmer, if he knows his business, is going to take an interest in the [fol. 128] consumer and the distributor as well as the producer. It is necessary to see the whole picture to form a concrete conclusion.

"Mr. McKay, I believe it was, made the remark that because of that cent difference the independent dealers were crowded into the red, and in his remarks he said something to this effect, that milk which was all of the same quality or virtually of the same value was selling under two different bases.

"I would suggest to the independent dealers that they take that citation out of the record and use it as their best advertising in the coming campaign to bring their milk up to the level of the so-called advertised brands, an admission right here that their milk is just as good as the advertised brands.

"My point, however, is this, that there is something that enters into that to account for that justification of charging a cent more. Certainly it costs something to advertise it. There is one prominent agricultural magazine that carries a full page advertisement every issue that I understand costs around $60,000 a year. That is an advertising item. It has got to come from somewhere. If the independents are not spending it, they can afford to sell milk a little cheaper.

"I don't want to get into complications, but if I had my way about it, I would legislate that milk advertising out, and I would take every dealer and require him to con-

tribute to an advertising fund and put it in the Control Board's hands and advertise the food value of milk, and not a full page advertisement, and I challenge any man to look back for the last ten issues and find a single one of those full page advertisements that will convince anybody that milk is a better food than anything else. It merely convinces a cooperative member that he had better stick to his cooperative. It is taking $60,000 of his money to advertise to himself that he is in the right organization and not that the public should drink more milk." (Pages 178-180.)

Paul Balsam made a statement from which the following is quoted. From other parts of his argument it appeared that he was speaking on behalf of I. Balsam, his father, who is a producer-distributor keeping about 200 cattle within the city limits of New York City and selling the milk as an unadvertised brand to stores. He said:

[fol. 129] "I will at this time first refer to the statement made by independent dealers, that they wish to sell their product, which is an unadvertised product, in the City of New York at a price which is one cent below that of advertised products, and in support of that I wish to say that it is not the fact that we are charitable that compels us to do this. I will say it is because of the fact that if we are forced by the Legislature or by any Control Board to increase the price of our product so that it will net us a return which is far in excess of what the average investment should receive, that it will tend to increase the cost of our distribution in excess of one cent.

"So you will have an instance of where a certain group of people willing to sell merchandise at a certain price in comparison with another group who, by reason of advertising expense and because of their capital structure must receive a larger price. You have the instance where we will be forced to increase our expense in distribution by this way.

"If the average man maintains a business and distributes 400 cases of milk over a certain territory in the City of New York and operates four trucks in that particular area, and if the effect of the increase in price to the consumer was to decrease the amount of consumption, first, because of the fact that certain people could not afford to

pay that excess cent and, secondly, because of the fact that certain well advertised brands have carried on a program of advertising, which in itself did not lend any color to the milk industry or even to the quality of their own product, that if then our routes in the same territory produce, or distribute, rather, 200 cases of milk where the same routes distributed 400 before, why, that increases our cost over the cent. So rather than put us in a position whereby we increase our costs, why not give it to the consumer?

"I will cite certain instances. I have heard the statement made that when the profit and loss statement of certain companies was taken that it was based on a 1927 valuation. There is a certain very large company, a subsidiary of a national company, that was purchased some years ago, during times of prosperity, for a certain sum of money, and let us say for argument's sake that that sum of money involved was $50,000,000, and I don't think I am far wrong in my figures. Well, how did they raise that revenue to buy that business for $50,000,000? Well, at a [fol. 130] time when people were buying stocks and bonds they floated a bond issue to cover the cost of the purchase of that plant, and there is no question that every business has depreciated in value in so far as its assets are concerned, in so far as its building is concerned, in so far as its goodwill is concerned, due to the fact that their returns are not so good today as they were in those years of prosperity. So that particular individual company who floated the bonds and must pay a sum anywhere from four, five, six and in certain cases there have been floatings of bonds for a larger percentage of interest, that company now must make a return or secure a return from their business which might be valued at a smaller amount today and is. There is no question about it. And if, for argument's sake, bonds were issued at six per cent, and if that business today is worth 50 per cent of what it was in good times, you have a situation where the business must produce 12 per cent of its actual value today as compared to what would be 6 per cent in normal times.

"We don't have that capital structure in our business. We don't even have any watered stock in our particular instance. It is an individual that conducts the business, and has so conducted the business for the past thirty years.

"Now, this firm that I represent, in the past thirty years has made no effort to become a large enterprise. We at the present time are selling approximately a little more than 200 cases of milk, which we produce. During the years that we were in business we could have increased our business so that possibly today we might be in a position to sell either a thousand cases or more, but we always felt that any attempt to increase the volume of our business or any attempt by any other dealer to increase the volume of his business other than by a direct purchase of that business from another concern would tend to destroy the prices of milk.

"We are prepared and can sell milk a penny below the advertised brands.

"I have heard Mr. McKay made a statement here, and he said to you gentlemen: Now, Dr. Spencer's report said that it cost this much and cost that much and so on with reference to freight and hauling of milk and so on.

[fol. 131] "Now, did he say to you, it cost me that much to operate my business? He didn't say that, and I say that you must maintain the independent dealers as a gauge of what is economy in the milk business, because the independent man when he operates his business and operates it for himself is attempting to effect whatever reasonable economies he can for himself.

"Now, Mr. McKay went on to say that it cost 45½ cents to bring in 100 pounds of milk from the country by rail and it cost 6 cents to haul that can of milk from the railroad into the plant. That is so, gentlemen, but that is if you ship one can of milk or two cans of milk, it will cost you 45½ cents, and the 6 cents to haul it to your plant, or if you ship any amount, that is, under the carload rate.

"Mr. McKay himself and a good many other dealers—and this is one of the instances of their effecting economies—are shipping milk today into the City of New York from the 200 mile zone at the rate of approximately 30 cents per hundred-weight. There is a difference of 21½ cents in those figures immediately, for this reason, that when the tank is bringing the tankload of milk from the country, it brings it directly to the station of the dealer. You don't have to go to the railroad to get that, and I imagine if any other figures were quoted that you could find freak bookkeeping and statements of that sort which would tend to add to the cost.

"We say that you must maintain the independent dealer because he gives you a true picture of what actually is. He must. He feels as if the big fellows want the entire business.

"With reference to his statement, and I think I quote him correctly; I intend to, at any rate—that if you give the independent dealers the right to sell at one cent below, they are going to cheat. That is absolutely not so. We at a time when the prices prevailed in accordance with what the Milk Control Board ordered, and that price was nine cents, bought an additional quantity of milk from the firm known as the United Milk Products, and that milk cost us delivered, raw, into our plant, $2.55, and we sold it for nine cents, but at the time that the competition got to be such that other people who sought to increase their business destroyed the price structure and we reached the conclusion that we no longer could handle that milk at a reasonable return. If we could have handled it at cost, we [fol. 132] would have maintained it. We let that portion of our business go. So that now we remain in the position where we are selling whatever merchandise we produce.

"Now, he attempted to paint a picture also that the independent dealer would attempt to break down the structure. I charge that for years gone by it was always the big man or the man who sells this so-called advertised milk that has always broken down the price structure." (Pages 196-202.)

A witness by the name of Hoffer, representing New York City storekeepers, said:

"I come from New York, and I think I am going to make it as brief as possible. We come in here, and where in New York we are worried on account of the bill as introduced now having gotten into what we had last year, that we have the advertised and unadvertised brands, and in New York we are worried.

"Chairman Byrne: You want it in, do you?

"Mr. Hoffer: We want it in because 40 or 45 per cent of our business in New York is milk and milk products, and we have today particularly with the relief food tickets, and we haven't got the unadvertised at one cent cheaper, and therefore we are sure to lose 50 per cent of our business, and we are particularly worried.

"I have been sent by my organization to see and do my utmost, if I can. We have to have in New York, particularly the independent storekeepers dealing with the poorer customer, the woman that comes down to the store to buy a bottle of milk just because she is saving two cents. If we were to be put on the level of no difference which milk, we are sure to lose 50 per cent of our business and probably 50 per cent of our business men in New York, because it is between 45 and 50 per cent of their business that is dairy. We would like to endorse in regard to this committee, to endorse the recommendation of Mr. Cooke that I heard today, to increase the membership of the Milk Control Board, but to increase it so that also these 75 to 85 thousand retail grocers in the State of New York have also a representative.

"Chairman Byrne: Yes.

"Mr. Hoffer: We have always been the forgotten men wherever it came. We have given full 100 per cent cooperation and in New York City we have given 100 per cent cooperation to the Milk Control Board. We are always giving our cooperation. I see no reason, or it looks [fol. 133] to me as unjust when they forget the retail grocer in New York City with 30 or 35 thousand dealers. They are selling all that. The farmer is claiming and all that the independent dealer is claiming, we are selling direct to the woman the milk, and at all times we are forgotten. New York is for, and I can say 100 per cent for, having two prices on milk, one cent cheaper for the lady that has a food ticket, or if she hasn't got a food ticket she comes down from upstairs and is willing to save two cents on a bottle of milk.

"Chairman Byrne: You really like the Control Board idea, do you?

"Mr. Hoffer: Yes sir.

"Chairman Byrne: In other words, it has worked out all right?

"Mr. Hoffer: Right.

"Chairman Byrne: We were worried a year ago. We were fearful that perhaps the consumer, particularly in the big centers like New York, would feel that they were having something foisted upon them that should not be, and yet your reaction is now after a year's experience, that there is no objection to control, is that correct, no general objection?

"Mr. Hoffer: I am a grocer myself. I stand behind a counter and I haven't heard for the last year a kick coming from any of my customers, so to say.

"Chairman Byrne: Thanks very much to you. That is wonderful. Thank you very much." (Pages 217-220.)

[fol. 134] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

E 78-91

BORDEN'S FARM PRODUCTS COMPANY, INC., Plaintiff,

against

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, et al., Defendants

Before L. Hand, Circuit Judge and Goddard and Coxe, District Judges

On return to an order to show cause why the defendant should not be enjoined pendente lite from enforcing Section 258 (q) of the Agriculture & Markets Law of New York and certain administrative orders made thereunder. On motion by the defendants to dismiss the bill.

Timothy N. Pfeiffer for the plaintiff.

Henry S. Manley for the defendants.

Gabriel Kotcher, Ezra B. Kotcher, Leonard Acker and Abraham Lipton as amici curiæ, representing various independent milk dealers.

OPINION—Filed Jun. 7, 1934

L. HAND, Circuit Judge:

This case comes up upon a bill in equity to enjoin the Commissioner of Agriculture and Markets of New York, the Director of the Division of Milk Control, the Attorney General and the various district attorneys of the City of New York, from enforcing § 258 (q) of the Agriculture and Mar-

kets Act, enacted on April 1, 1934; which so far as is per- [fol. 135] tinent, is printed in the margin.* Section 258 (m) of the act authorized the commissioner upon making proper investigation to fix mimimum prices to be paid by milk dealers to producers for milk of various grades, and to be charged by milk dealers to consumers and stores, and by stores to consumers. An earlier act which was to expire on May 31, 1934, contained similar provisions, (§ 312 (b) and § 317 (c) of Chapter 158 of the Laws of 1933), under which the Board of Milk Control, the predecessor of the present commissioner, had determined that the phrase, "well advertised trade name" should include only the plaintiff and three other of the larger dealers in milk. This order has remained in force and the plaintiff has not tried to secure any enlargement of the class. The four distributors named sell about 35% of the bottled milk that is sold to stores in New York City; the remainder is sold by a large number of "independent" dealers. It does not appear how large a part of the bottled supply which is delivered directly to the consumer is in the hands of the four; the report of the Joint Committee appointed by the New York Legislature, (p. 166), declared that in 1933, 95% of the retail distribution was in the hands of five companies. By far the greater quantity of milk sold in New York is known as Grade B, the price of which the commissioner fixed at twelve cents for dealers direct to the consumer; ten cents from the dealer to stores; and eleven cents from the [fol. 136] store to the consumer. The result of the privilege given by § 258 (q) is that unadvertised dealers may sell to stores at nine cents, and that the stores may pass on

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* "It shall not be unlawful for any milk dealer who since April 10, 1933, has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name and such lower price shall also apply on sales from stores to consumers provided that in no event shall the price of such milk not having a well advertised trade name be more than one cent per quart below the minimum price fixed for such sales to stores in such a city."

this differential to the consumer. The law provides for the granting of licenses by the commissioner without which no one can sell milk (§ 257); to get a license the dealer must state such facts as the commissioner considers necessary, (§ 258), among which he has directed that the applicant shall agree in writing to obey all the provisions of the law. As a consequence the plaintiff must surrender its power to challenge the validity of § 258 (q), or proceed by such a bill as this. Every sale of milk is subject to a fine if the seller is not licensed; and as the plaintiff makes many sales every day, the cumulative penalties are destructive. Nobody suggests that the situation so presented is not proper for the intervention of a statutory court under § 266 of the Judicial Code, and our jurisdiction to decide the constitutionality of the statute is therefore apparent and unchallenged. We proceed to the merits.

We may not concern ourselves with the wisdom of the effort in which the legislature of New York has engaged, or of the appropriateness of the means it has taken. To fix minimum prices for milk may in the end result in lessening consumption and leave the farmer, who is the putative beneficiary, in a worse position than he was before; conceivably there is no escape except by curtailing production, whatever the attendant distress. With all this we have nothing to do; it has now been finally decided that the program is lawful, and our consideration is narrowed to this incident in the general scheme. Nebbia v. N. Y., 291 U. S. —. The immediate problem is not old; before June [fol. 137] 1, 1933, "loose", (unbottled), milk could be lawfully sold in the City of New York, and it was impractical to sell it at two prices because the ordinary consumer did not distinguish whose milk he was getting; substantially no bottled milk was sold by stores, and there was active competition in "loose" milk, which was sold both by the "well-advertised" dealers and the "independents". When however by ordinance the city forbad- its sale, the older brands could at once be detected, and the "independents" whose hold upon this part of the market then became precarious, demanded some protection against what they asserted to be an unfair advantage. The Act of 1933 did not when introduced contain any such provision; it was amended in committee, indeed in advance of the actual prohibition of "loose milk", though the ordinance had been passed some

months before. The joint legislative committee had not recommended it. Nor did the provision appear in the original act of 1934; again it was introduced at the demand of the "independents" and to meet their supposed grievance. We do not see, however, that this is relevant. Most legislation is the resultant of conflicts between economic or social interests, and the legislature is the only place where they can be settled. The situation here was such that the legislature might fear that the larger dealers would gather into their hands substantially all sales of milk to stores; just as they already had gathered direct sales to consumers. If the "independents" had to sell at the same minimum, the public would probably choose the well-known brands; at any rate that was a reasonable possibility, to be provided against if the the result was undesirable. Perhaps it was not; it may be better to allow the four larger companies to take full advantage of their advertising, of [fol. 138] their reputation for cleanliness and quality; certainly it is true that the statute seeks to take from them economic advantages which were not only theretofore lawful, but which have generally been commended and fostered. But the consequences of allowing these advantages their full effect would probably, or at least it might, eliminate the "independents" from that part of the market which fed stores. If it did, the whole market would fall into few hands. That might be a good thing, or it might be a bad; but concentration of economic power has generally been watched with a jealous eye in this country. To prevent it or to break it up, rather than to regulate it after it arises, has on the whole been our preferred way; and in this instance competition between the four "well-advertised" dealers, might be thought not enough security. Many are fearful of hidden arrangements which may be made when the field is narrowed to a few. Often such suspicions are unreasonable, but they are part of that stock of beliefs on which a legislature is justified in acting; it is not, like a court, limited to premises which it can prove. Nor was it necessary that the law should cover more than the city, itself more populous than any state of the Union except New York. Finally, if it was irrational to confine the differential to those "independents" who were in business on April 10, 1933, at least the plaintiff cannot complain of that; its favored competitors are thereby the fewer. Besides, it

may have been thought that there were enough in the field already.

Further, it seems to us that the section may have been thought to fit in with the major purpose of the statute, which was to relieve the dairy farmer by insuring him a better price without reducing his market. His price was fixed for all "independents" and "well-advertised" deal-[fol. 139] ers alike; but the amount of milk sold might vary with the price to the consumer, at least that is true for most commodities. The attempt was not to fix two prices in the same market for the same commodity; the hypothesis is that to the public a well-known brand is of different quality. If this proves true, the several brands will sell together, the cheaper will not drive out the dearer. The result will be, or it may be,—for we must deal only in possibilities,—that more milk will be marketed than if the fixed price were uniformly maintained, though less than if it were lowered. True, the "spread" between the farmer's and the consumer's price was fixed where it was, we assume, to protect the farmer, and any concession like this may somewhat endanger it. That it would break it down no one can say in advance; certainly it may have a very different effect from a lesser "spread" generally available over the whole market. Such questions of more or less, of how far principle may be sacrificed without sacrificing substance, are typical of those which legislatures must answer; as soon as we can see a possible purpose in the measure, our function ends. It is scarcely possible to conceive of a policy of price-fixing which will not disturb existing economic powers; its very postulate and purpose is to do so, to favor this group, which is weaker; to repress that, which is stronger. The state takes a hand because it is not satisfied with the final equipoise, which surrenders other values conceived to be greater. It must appraise those values for itself. Miller v. Schoene, 276 U. S. 272, 279; Radice v. New York, 264 N. Y. 292, 294, 295. We have indeed an eventual review of that appraisal, but only, as we understand it, when we can see beyond a doubt that its implicit standards are not among those current and generally [fol. 140] acceptable in the community. We are not satisfied of that in this instance.

No precedents come very close, but the "trading-stamp" cases, (Rast v. Van Deman & Lewis, 240 U. S. 342; Tanner v. Little, 240 U. S. 369), and the "chain-store" tax cases,

(Tax Com'r. v. Jackson, 283 U. S. 527; Liggett Co. v. Lee, 288 U. S. 517), appear to us pertinent. True, courts have been more chary in upsetting tax statutes than general municipal regulations, but there are sound analogies notwithstanding. The burden of an unequal tax is as effective a handicap in marketing the taxpayer's product as a duty to charge a fixed price. The taxpayer can hold his market only in case his profits are already so large that he can bear the added load without increasing his price. Otherwise he must raise it, and then he falls into the same position as the plaintiff here. In the decisions we have cited the only discernible ground for the legislation was to ease competition in favor of weaker members of a mutually competing group; here it is not so much the "independent" dealers whom the legislature may have had in mind, as the farmer whose market might be better secured. As between the two situations the advantage seems to us to lie with the present statute. The plaintiff sets its chief reliance upon Cotting v. Kansas City Stockyards Co., 183 U. S. 79, and Smith v. Cahoon, 283 U. S. 553. Some of the language of the minority opinion in the first case might indeed give it comfort, but the case concerned a statute which singled out one company alone, and that was the only ground for the decision of six of the justices who concurred. It has been so interpreted. St. Louis Consol. Coal Co. v. Illinois, 185 U. S. 203, 207, 208; Arkadelphia Co. v. St. Louis etc. Ry., 249 U. S. 134, 149. As for Smith v. Cahoon, the statute was [fols. 141–147] held bad because no one was able to suggest any rational ground for the discrimination in a similar situation where such a ground could be found, the court reached the opposite result. Continental Baking Co. v. Woodring, 286 U. S. 352.

The bill does not state a cause of suit and must be dismissed; the application for an injunction pendente lite necessarily falls along with it. We do not understand that Rule 70½ of the Equity Rules applies to this situation and therefore make no findings. The motions to intervene are denied.

Bill dismissed; injunction denied; intervention denied.

Borden's v. Baldwin.

I concur:

Henry W. Goddard.

June 5/34.

Borden's v. Baldwin.

I concur.

Alfred C. Coxe, D. J.

[File endorsement omitted.]

[fol. 148] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. No. 78-91

BORDEN'S FARM PRODUCTS COMPANY, INC., Plaintiff,

against

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, John J. Bennett, Jr., as Attorney General of the State of New York, William C. Dodge, as District Attorney of the County of New York, William F. X. Geoghan, as District Attorney of the County of Kings, Samuel J. Foley, as District Attorney of the County of Bronx, Charles S. Colden, as District Attorney of the County of Queens, and Thomas J. Walsh, as District Attorney of the County of Richmond, Defendants

DECREE—Filed July 9, 1934

This cause came on to be heard before Honorable Learned Hand, Circuit Judge, Honorable Henry W. Goddard, District Judge, and Honorable Alfred C. Coxe, District Judge, specially sitting as a Statutory Court convened pursuant to the provisions of Section 380 of Title 28 of the United States Code, and was argued by counsel and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed as follows:

1. The plaintiff's motion for an interlocutory injunction be and it hereby is denied.

[fol. 149] 2. The bill of complaint be and it hereby is dismissed for want of equity.

3. The petition of Council of Independent Milk Dealers, Inc., the petition of New York Milk Producers Federation, Inc. and others, the petition of Rutland Co-operative Association, Inc. and others, and the petition of Federated Grocers Association of Greater New York for leave to intervene in this cause be and each of them hereby is denied.

4. If an appeal be allowed to the plaintiff from this decree within ten days after the date hereof, and the plaintiff shall execute and file a bond in the sum of $1000 conditioned for the payment of all damages which may accrue to the defendants by virtue of this order, the defendants, and each of them, in their respective official capacities, shall be and hereby are enjoined and restrained pending said appeal from bringing or prosecuting or attempting to bring or to prosecute, directly or indirectly, or causing to be brought or prosecuted, directly or indirectly, any action, suit or proceeding at law or in equity, or any criminal action or proceeding against the plaintiff or any officer, agent or employee thereof, by reason of the plaintiff continuing its business as a milk dealer without having first obtained the license required by Article 21 of the Agriculture and Markets Law of the State of New York, or against any other person, firm, corporation or association, or any officer, agent or employee thereof, or from revoking any license required by said Article 21 to be obtained and held by any such person, firm, corporation or association by reason of such person, firm, corporation or association pur-
[fol. 150] chasing milk from or selling milk to the plaintiff, or in any way dealing in or handling milk of the plaintiff although the plaintiff shall not have obtained the license required by said Article 21 of the Agriculture and Markets Law; Provided, however, that the plaintiff shall not have taken any action or omitted to take any action constituting grounds for refusal or revocation of the license provided for by said Article 21 of the Agriculture and Markets Law, other than by refusing to agree in writing to comply with and obey the provisions of the said Agriculture and Markets Law and the rules and orders promulgated by the defendant, Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, and in particular by refusing to agree in writing to sell to stores in the City of New York, and from its stores in the said City to consumers, its fluid milk in bottles under its trade name

"Borden's" at a price not less than the minimum price fixed in applicable orders promulgated from time to time by the said Commissioner.

Dated July 5, 1934.

Learned Hand, United States Circuit Judge. Henry W. Goddard, United States District Judge. Alfred C. Coxe, United States District Judge.

[fol. 151] The undersigned hereby consent to the entry of the foregoing decree.

Dated Albany, New York, June 22, 1934.

Henry S. Manley, Henry Epstein, Solicitor General, Solicitors for Defendants Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, and John J. Bennett, Jr., as Attorney General of the State of New York.

[fol. 152] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF PLAINTIFF FOR ALLOWANCE OF APPEAL—Filed July 17, 1934

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Now comes Borden's Farm Products Company, Inc., the plaintiff in the above entitled cause, and feeling itself aggrieved by the decree made herein on the 5th day of July, 1934, hereby prays that an appeal may be allowed to it from the said decree to the Supreme Court of the United States for the reasons specified in the Assignment of Errors filed herewith, and that a transcript of the record proceedings and papers upon which the said decree was made, [fol. 153] duly authenticated, may be sent to the Supreme Court of the United States under the rules of the said Court in such cases made and provided.

And your petitioner further prays that the proper order relating to the security to be required of it be made.

Dated July 12, 1934.

Milbank, Tweed, Hope & Webb, 15 Broad Street, New York, N. Y., Solicitors for Plaintiff. Timothy N. Pfeiffer, of Counsel.

[fol. 154] In United States District Court

[Title omitted]

Assignment of Errors—Filed July 17, 1934

Now comes Borden's Farm Products Company, Inc., the plaintiff in the above entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of its appeal from the decree made herein by this Honorable Court on the 5th day of July, 1934.

I

The United States District Court for the Southern District of New York erred in denying the interlocutory injunction prayed for by the plaintiff.

[fol. 155]

II

The United States District Court for the Southern District of New York erred in dismissing the bill of complaint for want of equity.

III

The United States District Court for the Southern District of New York erred in holding that the last sentence of Section 258 (q) of the Agriculture and Markets Law of the State of New York (as adopted by Chapter 126 of the Laws of 1934) and the orders adopted by the defendant Commissioner of Agriculture and Markets pursuant thereto did not deprive the plaintiff of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

IV

The United States District Court for the Southern District of New York erred in holding that the last sentence

of Section 258 (q) of the Agriculture and Markets Law of the State of New York (as adopted by Chapter 126 of the Laws of 1934) and the orders adopted by the defendant Commissioner of Agriculture and Markets pursuant thereto did not deny the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, the plaintiff prays that the aforesaid decree be reversed and that the United States District Court for the Southern District of New York be ordered to enter a [fol. 156] decree in accordance with the prayers of the bill of complaint or in such form as the Supreme Court of the United States shall deem just.

Dated July 12, 1934.

Milbank, Tweed, Hope & Webb, 15 Broad Street, New York, N. Y., Solicitor for Plaintiff. Timothy N. Pfeiffer, of Counsel.

[fols. 157-164] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed July 17, 1934

And now, to wit, July 12, 1934, the foregoing appeal to the Supreme Court of the United States is allowed upon the giving by the above named plaintiff of a bond as required by the law in the sum of Two hundred fifty dollars ($250).

(Sgd.) Henry W. Goddard, United States District Judge.

[fol. 165] Supreme Court of the United States

[Title omitted]

State of New York,
County of New York, ss:

Pearl E. Loeber, being duly sworn, deposes and says: I am over the age of twenty-one years and am employed in the office of Timothy Newell Pfeiffer, counsel for the appellant in the above entitled cause.

On the 24th day of August, 1934, I made service of the within statement of points to be relied upon and designation of the parts of the record to be printed upon Henry S. Manley and John J. Bennett, Jr., Esqs., Solicitors for Defendants Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, Kenneth F. [fol. 166] Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, and John J. Bennett, Jr., as Attorney General of the State of New York, William C. Dodge, Esq., District Attorney of the County of New York, William F. X. Geoghan, Esq., District Attorney of the County of Kings, Samuel J. Foley, Esq., District Attorney of the County of Bronx, Charles S. Colden, Esq., District Attorney of the County of Queens, and Thomas J. Walsh, Esq., District Attorney of the County of Richmond, by depositing in the Wall Street Station, a branch post office maintained by the United States Government at Pine and Pearl Streets, Borough of Manhattan, City of New York, a true copy thereof duly enclosed in a postpaid wrapper by registered mail addressed to said persons at their respective post-office addresses as follows:

Henry S. Manley, Esq., State Office Building, Albany, N. Y.

John J. Bennett, Jr., Esq., Capitol, Albany, N. Y.

William C. Dodge, Esq., District Attorney of the County of New York, 137 Centre Street, New York, N. Y.

William F. X. Geoghan, Esq., District Attorney of the County of Kings, 400 Municipal Building, Brooklyn, N. Y.

Samuel J. Foley, Esq., District Attorney of the County of Bronx, Tremont & Arthur Avenues, Bronx, N. Y.

Charles S. Colden, Esq., District Attorney of the County of Queens, County Court House, Long Island City, N. Y.

[fol. 167] Thomas J. Walsh, Esq., District Attorney of the County of Richmond, County Court House, Staten Island, N. Y.

Pearl E. Loeber.

Sworn to before me this 24th day of August, 1934.
Arthur John Keeffe.

[fol. 168] Sirs: Please take notice that the within is a true copy of the appellant's statement of points to be relied

upon and designation of the parts of the record to be printed.

Dated August 23, 1934.

Yours, &c., Timothy Newell Pfeiffer, 15 Broad Street, New York, N. Y., Counsel for Appellant.

To Henry S. Manley and John J. Bennett, Jr., Esqs., Solicitors for Defendants Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, Kenneth F. Fee, as Director of the Division of Milk [fol. 169] Control of the Department of Agriculture and Markets of the State of New York, and John J. Bennett, Jr., as Attorney General of the State of New York.

William C. Dodge, Esq., District Attorney of the County of New York.

William F. X. Geoghan, Esq., District Attorney of the County of Kings.

Samuel J. Foley, Esq., District Attorney of the County of Bronx.

Charles S. Colden, Esq., District Attorney of the County of Queens.

Thomas J. Walsh, Esq., District Attorney of the County of Richmond.

[fol. 170] STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED —Filed Aug. 29, 1934

Comes now the appellant in the above-entitled cause and states that the points upon which it intends to rely in this Court in this cause are as follows:

Point I. That the District Court of the United States for the Southern District of New York erred in denying the interlocutory injunction prayed for by the appellant.

Point II. That the District Court of the United States for the Southern District of New York erred in dismissing [fol. 171] the bill of complaint for want of equity.

Point III. That the District Court of the United States for the Southern District of New York erred in holding that the last sentence of Section 258 (q) of the Agriculture and Markets Law of the State of New York (as adopted by

Chapter 126 of the Laws of 1934) and the orders adopted by the defendant Commissioner of Agriculture and Markets pursuant thereto did not deprive the appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Point IV. That the District Court of the United States for the Southern District of New York erred in holding that the last sentence of Section 258 (q) of the Agriculture and Markets Law of the State of New York (as adopted by Chapter 126 of the Laws of 1934) and the orders adopted by the defendant Commissioner of Agriculture and Markets pursuant thereto did not deny the appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

And the appellant further states that only the following parts of the Record, as filed in this Court, need to be printed by the Clerk for the hearing of this cause:

Title of Paper.

(1) Bill of complaint, verified April 26, 1934 and exhibits annexed thereto.

(2) Order to show cause, dated April 26, 1934.

(3) Affidavit of John F. Watson, verified April 26, 1934 and exhibit annexed thereto.

[fols. 172 & 173] (4) Amendment of bill of complaint, verified May 4, 1934.

(5) Motion of defendants Baldwin, Fee and Bennett to dismiss bill of complaint.

(6) Supplemental affidavit of John F. Watson, verified May 3, 1934, and exhibits annexed thereto.

(7) Affidavit of W. H. Marcussen, verified May 4, 1934.

(8) Answering affidavit of Henry S. Manley, verified May 7, 1934, and exhibit annexed thereto.

(9) Opinion of the Court.

(10) Decree, dated July 5, 1934.

(11) Petition for allowance of appeal.

(12) Assignment of errors.

(13) Order allowing appeal, dated July 12, 1934.

(14) Statement of appellate jurisdiction pursuant to Supreme Court Rule 12.

Timothy Newell Pfeiffer, (P. O. Address:) 15 Broad St., New York, N. Y., Counsel for Appellant.

[fol. 174] [File endorsement omitted.]

Endorsed on cover: File No. 38,924. S. New York D. C. U. S. Term No. 296. Borden's Farm Products Company, Inc., Appellant, vs. Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, et al., etc. Filed August 17, 1934. File No. 296, O. T., 1934.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

BORDEN'S FARM PRODUCTS COMPANY, INC.,

Plaintiff,

against

CHARLES H. BALDWIN, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, KENNETH F. FEE, AS DIRECTOR OF THE DIVISION OF MILK CONTROL OF THE DEPARTMENT OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, JOHN J. BENNETT, JR., AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, WILLIAM C. DODGE, AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, WILLIAM F. X. GEOGHAN, AS DISTRICT ATTORNEY OF THE COUNTY OF KINGS, SAMUEL J. FOLEY, AS DISTRICT ATTORNEY OF THE COUNTY OF BRONX, CHARLES S. COLDEN, AS DISTRICT ATTORNEY OF THE COUNTY OF QUEENS, AND THOMAS J. WALSH, AS DISTRICT ATTORNEY OF THE COUNTY OF RICHMOND,

Defendants.

STATEMENT OF BASIS UPON WHICH PLAINTIFF CONTENDS THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE DECREE APPEALED FROM, AS REQUIRED BY SUPREME COURT RULE 12.

Filed July 17, 1934.

Pursuant to Supreme Court Rule 12, paragraph 1, Borden's Farm Products Company, Inc., the plaintiff in

the above entitled cause, files this its statement showing the basis upon which it contends that the Supreme Court of the United States has jurisdiction upon appeal to review the decree appealed from herein, as follows:

I.

The statutory provisions believed to sustain appellate jurisdiction are Section 345 of Title 28 of the United States Code (Judicial Code, Section 238, amended) and Section 380 of Title 28 of the United States Code (Judicial Code, Section 266, amended.)

II.

The statute of the State of New York, the validity of which is involved in this cause, is Chapter 126 of the Laws of 1934 of the State of New York (not yet officially compiled) which adds a new Article 21 and a new Article 21-A to the Agriculture and Markets Law of said State, being Chapter 69 of the Consolidated Laws of said State. The said statute provides for the regulation of the purchase, sale and distribution of milk in the State of New York, and requires that the defendant Commissioner of Agriculture and Markets fix the minimum prices at which milk may be purchased and sold in said State. The only part of said statute the validity of which is involved in this cause is the last sentence of Section 258 (q) which reads as follows:

> "* * * It shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-three has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also

apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city."

The orders adopted by the defendant Commissioner of Agriculture and Markets, the validity of which is involved in this cause, are Official Order No. 12 designating the plaintiff and certain other milk dealers as having well advertised trade names for the purposes of the section of the statute above quoted, and Official Order No. 35, as amended by Official Order No. 59, fixing the minimum prices for the sale of fluid milk in bottles to stores and from stores to consumers in the City of New York and substantially incorporating the provisions of the section of the statute above quoted.

III.

The decree appealed from was made on the 5th day of July, 1934.

IV.

The application for appeal was presented on the 12th day of July, 1934.

V.

This action was instituted to restrain the defendants in their respective official capacities from enforcing the provisions of the section of the statute above quoted and the orders adopted by the defendant Commissioner of Agriculture and Markets pursuant thereto, on the ground that said statute and orders were arbitrary, unreasonable, oppressive and discriminatory and were in violation of the Fourteenth Amendment to the Constitution of the United States in that they deprived the plaintiff of its property without due process of law and in that they denied the plaintiff the

equal protection of the laws; and further to enjoin the defendants from proceeding in any manner against the plaintiff or any other person, firm, corporation or association by reason of the purchase or sale by them of the plaintiff's fluid milk in bottles under its trade name "Borden's" at a price as low as that at which the purchase or sale of fluid milk in bottles of any other milk dealer was authorized or permitted.

Equitable jurisdiction was established by reason of the inability of the plaintiff to obtain the license which it was required by law to obtain, unless the plaintiff should agree to comply with and obey the section of the statute complained of and the orders adopted pursuant thereto. Continuation of the plaintiff's business without first obtaining such license rendered the plaintiff and all milk dealers dealing with the plaintiff liable to the imposition of severe penalties and fines, and the officers, agents and employees of the plaintiff and of such milk dealers liable to imprisonment.

A temporary restraining order was granted pending the determination of the action enjoining the defendants from proceeding in any manner against the plaintiff or anyone dealing with the plaintiff by reason of the plaintiff continuing its business without obtaining the required license. A temporary injunction containing similar provisions was granted in the decree made July 5, 1934, pending the plaintiff's appeal therefrom.

The action was heard before Honorable Learned Hand, Circuit Judge, Honorable Henry W. Goddard and Honorable Alfred C. Coxe, District Judges, specially sitting as a Statutory Court convened pursuant to the provisions of Section 380 of Title 28 of the United States Code (Judicial Code, Section 266, amended). At the hearing plaintiff pressed its application for an interlocutory injunction and

certain of the defendants moved that the bill of complaint be dismissed. Thereafter, in conformity with an opinion delivered by Judge Hand, concurred in by the other members of the court, a final decree was made and entered denying the plaintiff's said application for an interlocutory injunction and dismissing the bill of complaint for want of equity.

VI.

The cases believed to sustain appellate jurisdiction are as follows:

Clark v. *Poor*, 274 U. S. 554 (1927);

Interstate Busses Corporation v. *Blodgett*, 276 U. S. 245 (1928);

Herkness v. *Irii* 278 U. S. 92 (1928).

Dated, July 12, 1934.

Respectfully submitted,

MILBANK, TWEED, HOPE & WEBB,
15 *Broad Street, New York, N. Y.,*
Solicitors for Plaintiff.

(Sgd.) TIMOTHY N. PFEIFFER,
Of Counsel.

FILE COPY

OCT 25 1934

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 296.

BORDEN'S FARM PRODUCTS COMPANY, INC.,
Appellant,

against

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, et al.,
Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT.

WALTER E. HOPE,
Counsel for Appellant.

TIMOTHY N. PFEIFFER,
JOHN E. LOCKWOOD,
EDGAR P. BAKER,
of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

BORDEN'S FARM PRODUCTS COMPANY, INC.,
Appellant,

against

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, et al.,
Respondents.

No. 296.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT.

Opinion Below.

The opinion of the United States District Court for the Southern District of New York is reported in 7 Fed. Supp. 352.

Statute Involved.

The statute involved is Article 21 and Article 21-A of the Agriculture and Markets Law of the State of New York, added by Chapter 126 of the Laws of New York of 1934 (not yet officially compiled).

The only part of the statute the validity of which is challenged in this action is the last sentence of Section 258 (q) of Article 21-A which provides as follows:

> "* * * * * shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-

three has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city." (Record, p. 60).

The above quoted section must be read in the light of Section 258 (m) which provides in part as follows:

"The commissioner shall investigate what are reasonable costs and charges for producing, hauling, handling, processing and/or other services performed in respect to milk, and what prices for milk in the several localities and markets of the state, and under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, and be most in the public interest. The commissioner shall take into consideration the balance between production and consumption of milk, the costs of production and distribution, and the purchasing power of the public.

"1. The commissioner, after making such investigations, may fix by official order:

"(a) The minimum prices to be paid by milk dealers to producers and others for milk in its various grades and uses * * *.

"(b) The minimum and/or maximum wholesale or retail prices to be charged for milk handled within the state for fluid consumption and wheresoever produced, when sold by milk dealers to consumers; by milk dealers to stores either for consumption on the premises or resale to consumers; by stores to consumers except for consumption on the premises where sold; by milk dealers to other milk dealers. A minimum wholesale or retail price

to be charged for milk shall not be fixed higher than is necessary to cover the costs of ordinarily efficient and economical milk dealers, including a reasonable return upon necessary investment. The fact that some dealers selling milk not having a well advertised trade name to stores in a city of more than one million inhabitants avail themselves of the privilege of making such sales at less than the minimum price shall not require fixing of the price higher than would otherwise be necessary." (Record, pp. 53-5).

Statement.

Nature of Case.

The sole issue in this case is the validity, under the "due process of law" and "equal protection of the laws" clauses of the Fourteenth Amendment to the United States Constitution, of that part of Section 258 (q) of the Agriculture and Markets Law above quoted, and the orders of the respondent Commissioner of Agriculture and Markets made pursuant thereto, which permit milk not having a well advertised trade name to be sold in New York City by dealers to stores and by stores to consumers at a price one cent less than the price at which the appellant's milk may be sold, and deny the right of the appellant to sell its milk at the lower price charged by its competitors.

The action was commenced pursuant to Section 266 of the Judicial Code (Title 28 U. S. Code § 380) by an application for an interlocutory injunction (Record, p. 64). The case was heard on such application by a statutory court of three judges. The relief prayed for was denied and the complaint dismissed upon the merits (Record, p. 119). Probable jurisdiction was found by this Court on October 8, 1934.

Statement of Facts.

In order that the provision challenged in this action (which for convenience will be referred to as the "one cent differential") may be understood it is necessary to

give something of the background of the legislation of which it is a part.

This provision is contained in the second of two fundamentally similar statutes for the control of the production and marketing of milk in New York State. The first of these statutes was adopted on April 10, 1933 as Chapter 158 of the Laws of New York of 1933 and expired by its own terms on March 31, 1934 (Record, p. 18). This was the statute which was before this Court in *Nebbia* vs. *New York*, 291 U. S. 502. (This statute will be referred to as the 1933 Milk Control Law.) The present statute became effective April 1, 1934 and is to continue until April 1, 1935 (Record, p. 39). (This statute will be referred to as the 1934 Milk Control Law.)

The 1933 Milk Control Law had its origin in the highly competitive conditions in the milk industry. The appellant had been in the business of distributing milk under the trade name "Borden's" since 1917 (Record, pp. 70-1). The trade name "Borden's" had been used by appellant and its predecessor, The Borden Company, in and about New York City for 75 years (Record, p. 71). The appellant had a great number of competitors. These competitors ranged from large organizations with city wide distribution to small units operating only in localized areas (Record, pp. 8, 71).

There were then, as there are now, two methods of distributing milk to consumers in New York City. The first was by door to door delivery; the second was over the counter at retail stores (Pitcher Report, p. 163*). There was intense competition in both branches, but the number of competitors was much larger with respect to the store business than with respect to the door to door delivery business (Pitcher Report, pp. 165-6). The heavy overhead costs of the door to door business and the correspondingly large capital investment required for its operation

*Report of the New York Joint Legislative Committee to Investigate the Milk Industry—Legislative Document (1933) No. 114. This report is referred to, *infra*, p. 5. Copies will be made available on the argument.

tended to limit the number of dealers operating in that field. Appellant has, since its organization, engaged in both types of business (Record, p. 70). *The one cent differential applies, however, only to the store business,* for which nearly 200 milk dealers compete (Pitcher Report, p. 165).

Upon this highly competitive industry the depression had a marked effect. With a greatly decreased demand for milk, the New York milk shed was flooded with a huge surplus (Pitcher Report, pp. 79-80, 97). Because of the attempts of milk producers to market this surplus the price of milk, both to them and to consumers, began to sink rapidly (Pitcher Report, p. 41). A price war was inaugurated with the result that the producers were being forced to sell below their cost of production (Pitcher Report, p. 46).

The situation in the industry in New York City was rendered more acute by the fact that in November, 1931, the Board of Health recommended that the sale of "loose milk"* be prohibited. This recommendation was, after several postponements, made effective on June 1, 1933 (Record, p. 85). The ban upon loose milk caused a considerable change in methods of distribution of the dealers. The resulting struggle for the new market in bottled milk intensified the already severe competition and contributed to the price war which demoralized the price structure (Record, p. 85).

In the face of this situation a joint legislative committee, known as the Pitcher Committee, was appointed to investigate the milk industry in New York and to make recommendations with regard to it (Record, pp. 81, 87). This Committee made an exhaustive inquiry.

The Pitcher Committee on February 13, 1933 issued its "First Preliminary Report," which was followed by its

*Loose milk was the term applied to milk sold from cans to consumers who carried away the milk in their own containers. Prior to the ban on loose milk, the over the counter store distribution of milk was limited almost entirely to loose milk. Loose milk, as the term implies, was not generally sold under any trade name. There was, however, keen competition among dealers for the business of delivering loose milk to stores. The appellant sold large quantities of this milk (Record, p. 85).

final report which was before this Court in the *Nebbia* case. Neither of these reports made any recommendation of any price differential between dealers, nor did either mention any distinction between dealers having a well advertised trade name and those not having such a name (Record, p. 81).

The preliminary report recommended the creation of a milk control board with power to investigate the milk industry and, of primary importance, with power to fix minimum prices which should be paid to producers and which should be charged for milk resold by dealers either through stores or by door to door delivery. The essence of this report was a recommendation that the State intervene to stop the price war and establish some sort of compulsory bottom to prices.

The Committee drafted a bill for a proposed milk control law embodying its recommendations (Record, p. 81). This bill provided that the Milk Control Board thereby created must fix the minimum prices which could be charged for the various grades of milk by dealers to consumers, by dealers to stores and by stores to consumers. The Milk Control Board was also permitted to impose maximum prices for such transactions and to fix the minimum prices to be paid to producers. In fixing the prices to producers the Board was permitted to "classify such milk by forms, classes, grades or uses" as it might deem advisable.

There was no provision in this bill as prepared by the Pitcher Committee for any differential between any dealers or groups of dealers (Record, p. 81). The bill contemplated that every dealer should pay to every producer the same price for a given classification of milk and that every dealer and every *store was entitled to charge* the same price for a given classification of milk. The Committee envisaged differentials based on differences in quality, use or service. It did not contemplate any differential where there was no such difference.

While the bill was in the Legislature a provision for a one cent differential with respect to the store business was

inserted in the bill by amendment. With this provision the bill became the 1933 Milk Control Law (Record, p. 18).

After the passage of this bill as so amended the Milk Control Board proceeded by official orders to fix the minimum prices which could be charged by dealers to consumers, dealers to stores and stores to consumers (Record, p. 35).

At the same time the Milk Control Board promulgated an order defining the phrase "well advertised trade name" and determined that that phrase applied to four milk distributors, namely, the appellant, Sheffield Farms Company, Dairymen's League Cooperative Association and M. H. Renken Dairy Company (Record, p. 34). These four companies did not more than thirty-five per cent. of the total store business (Record, p. 81). The effect of this order was that these four companies were required to conduct their store business at a price one cent higher than any of their competitors by reason of the fact that, although merely permissive in terms, the one cent differential has been universally taken advantage of by dealers not classified as having a well advertised trade name (Record, p. 72).

This order defining the companies as against which the one cent differential operates has never been amended (Record, p. 8). The correctness of the determination upon which this order is based is not in issue in this action, but it is not admitted by the appellant.

Prior to the expiration of the 1933 Milk Control Law the Milk Control Board recommended the continuance for another year of the major provisions of the 1933 law. It also recommended a number of changes, many of them administrative, and to carry out its suggestions prepared a new bill. Like the Pitcher Committee, it did not include the one cent differential in such bill (Record, p. 82). Again in the Legislature such a provision was inserted by amendment at the insistence of certain New York City dealers not having well advertised trade names (Record, p. 93). It is this provision which is attacked in the present case.

Appellant had no adequate remedy at law.

Under the 1934 Milk Control Law the appellant, as a milk dealer, was required to obtain a license in order to operate after May 1, 1934 (Record, p. 10). Unless such license was obtained continuance of its business was illegal (Record, p. 79). Also it was illegal for appellant's store customers to purchase milk from it (Record, p. 80). In order to obtain the license appellant was required to file with the respondent Commissioner of Agriculture and Markets an application in which, among other things, it undertook to comply with all rules, price fixing orders and other orders made by the Commissioner, including the rules and orders relating to the one cent differential (Record, p. 10). Appellant tendered to the Commissioner an application for a license and the fee therefor, and in all respects obeyed the requirements of the Commissioner except that it objected to compliance with the rules and orders relating to the one cent differential (Record, pp. 79, 83). Because of this refusal the appellant's application for a license was rejected (Record, pp. 79, 84).

The sale of appellant's bottled milk in New York City involved over 300,000 separate transactions daily (Record, p. 79). Unless appellant obtained a license, or was protected by injunction, each such transaction rendered the appellant and its officers, agents and employees liable to a penalty of $200 and to fines in equal amount for each bottle of milk sold, and also rendered the appellant's officers, agents and employees liable to imprisonment (Record, p. 79). In addition, appellant's store customers were liable to similar penalties, fines and imprisonment (Record, p. 80).

Appellant could not have attempted to challenge the validity of the statute and orders complained of by a single isolated violation. By reason of the one cent price differential the appellant estimated that its direct loss in business in sales to stores was in excess of 25,000 quarts daily (Record pp. 14, 80). The appellant was forced to operate this business at a price 10% higher than the ma-

jority of its competitors. In addition, the appellant's door to door delivery business was suffering severe losses due to a two cent or 20% differential against it in favor of store milk without a well advertised trade name. This resulted from an additional one cent price differential between milk delivered directly to consumers and milk purchased through stores (Record, pp. 73, 80). Appellant was daily being subjected to irreparable injury.

The appellant is now operating under a temporary restraining order granted by Judge Caffey and continued by the statutory court, by the terms of which the respondents are restrained from enforcing against appellant or any of its customers any of the penalties provided in the Agriculture and Markets Law by reason of the appellant operating without a license so long as the appellant complies with all the provisions of the law and all the rules and orders of the Commissioner except those requiring the appellant to agree to obey the rules and orders regarding the one cent differential (Record, p. 120).

Assignment of Errors.

The assignment of errors is as follows (Record, p. 122):

1. The United States District Court for the Southern District of New York erred in denying the interlocutory injunction prayed for by the appellant.

2. The Court erred in dismissing the bill of complaint for want of equity.

3. The Court erred in holding that the last sentence of Section 258 (q) of the Agriculture and Markets Law of the State of New York (as adopted by Chapter 126 of the Laws of 1934) and the orders adopted by the respondent Commissioner of Agriculture and Markets pursuant thereto did not deprive the appellant of its property without due

process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

4. The Court erred in holding that the said last sentence of Section 258 (q) of the Agriculture and Markets Law and the said orders adopted pursuant thereto did not deny the appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Summary of Argument.

I. The provision for the one cent differential constitutes an arbitrary and unreasonable discrimination against the appellant and others similarly situated, which denies them the equal protection of the laws.

II. The provision for the one cent differential represents a new departure in governmental regulation and is of a character which has never been sanctioned by this Court. The principle involved is unsound and its approval will lead to far-reaching and dangerous consequences.

III. The one cent differential is not an integral part of the Milk Control Law and may be declared invalid without invalidating the remainder of the statute.

ARGUMENT

I.

The provision for the one cent differential constitutes an arbitrary and unreasonable discrimination against the appellant and others similarly situated, which denies them the equal protection of the laws.

That the provision is discriminatory is immediately self-evident.

First, the State prescribes the standards and classification of milk and the conditions under which it may be sold. The State then proceeds to fix and determine uniform minimum prices to be paid to producers, so that each producer will be assured the same price for the same quality of milk. The State next prescribes minimum prices at which milk may be sold to stores and by stores to consumers. The State then decrees that, although the milk sold by all distributors must conform to the same standards, the milk of certain distributors must be sold at a higher price while their competitors are permitted to sell at a lower price, and the former may not enter into free and open competition with the latter.

The sole distinction upon which this discrimination is based is the possession of a "well advertised trade name." It may be well, therefore, at the outset, to analyze the character of this distinction.

The appellant and its predecessor have been selling milk for 75 years. During part of that time, at least, it has advertised its product. It has built up a good name for quality, purity and cleanliness. But if the appellant for one week should distribute an impure milk, a diseased milk, or a milk injurious to health, its business would disappear over night. The fact of advertising does not, in reality, therefore, constitute the criterion upon which this penalty is imposed. It is the good reputation which the appellant has built up over the years. The "well advertised trade

name'' is merely the symbol and not the substance. By this provision the State elects to say to competing dealers ''You who have not built up and maintained a reputation and a well known name may sell your milk at a certain price, but you who have spent years in building up a reputation and a well known name may not sell your milk at that price and meet that competition. You must sell at a higher price.'' And this when the State, by other statutory provisions, has decreed that the milk of both competitors must meet identical standards.

The vice lies not in fixing the price at which milk may be sold, but in prohibiting the appellant from meeting the price of competitors in fair and open competition. That is the essence of this case.

Certainly the element of advertising, or the possession of a ''well advertised trade name'', constitutes a wholly artificial and inadequate distinction upon which to base a discrimination so far-reaching in its effect.

The reasonableness of the classification established by the one cent differential is to be judged in the light of the following considerations:

1. It has not been advocated by any of the impartial investigating agencies.

The one cent differential was not recommended by the Pitcher Committee after its thorough investigation nor by the Milk Control Board after one year of administration of the law. It is apparent, therefore, that the differential does not constitute a feature of any considered policy. It is not the product of careful analysis by the economic and social experts delegated by the State to study the situation and to formulate appropriate remedies. Nor has it been adopted by other States having milk control laws similar to that of New York. In none of them is there provision for any differential analogous to the one cent differential (Record, pp. 82, 89). Even in New York State the one cent differential applies only in New York City and only to one branch of the business. And even in New York

City it applies only to dealers who have been in the business continuously since April 10, 1933.

2. It has no relation to cost.

There is no evidence in the record and no finding by the Pitcher Committee, the Milk Control Board, the present Division of Milk Control or any other agency affording any basis for relating the one cent differential to the cost of appellant's advertising or to the general costs of operating its business. It is uncontradicted on the face of the record that appellant's advertising costs less than one-fifth of a cent per quart of milk sold (Record, p. 72).

3. It has no relation to quality.

There is no evidence in the record, nor has it been suggested that the one cent differential is based upon quality. Apart from the one cent differential, prices of milk are graded on the basis of quality (butter fat content and the like). The milk which appellant's competitors may sell at one cent less than appellant is milk which is required by law to adhere to the identical classification standards as the appellant's milk.

4. It has no relation to service.

The one cent differential has no relation to the amount or quality of the services rendered. The actual selling of the milk to which the differential relates is done by stores independent of either the appellant or its competitors. The standards for bottles, caps and the like are fixed by law and are uniform for all dealers.

5. It is not an expression of policy against appellant's advertising.

The one cent differential does not represent an attempt to regulate or to discourage advertising. In fact, the State

of New York is itself now spending thousands of dollars in advertising milk.* It thus has declared its policy as distinctly in favor of advertising milk generally. There is no indication in the findings of the Pitcher Committee, in the record of this case or in the language of the statute that appellant's advertising is objectionable in substance or in form, or that any attempt is being made to regulate it. The statute would not even permit the appellant to obtain the benefits of the differential if it should alter its advertising or even cease such advertising altogether.

6. It is not aimed at unfair practices.

There was no finding by the Pitcher Committee, nor is there any suggestion in the record that the dealers classified as having well advertised trade names were guilty of any unfair practices.

7. It is not directed against monopoly.

The possibility of monopoly, or "concentration of economic power," was suggested by the Court below as a justification for the one cent differential. The record and the findings of the Pitcher Committee negative the existence of any reasonable basis for such fear.

The Pitcher Committee expressly found:

(a) That the four dealers described as selling milk under a well advertised trade name do only about thirty-five per cent. of the store business (Pitcher Report, pp. 163, 165-6).

(b) That in New York City less than half of the milk sold is distributed by door to door delivery.

*Article 25-A of the Agriculture and Markets Law, added by Chapter 822 of the Laws of 1934, provides for a Bureau of Milk Publicity with power to carry on an extensive advertising campaign to increase the consumption of milk. The cost is to be defrayed by a State appropriation (Record, p. 82).

Since 1930 the sales of bottled milk through stores have increased at the expense of sales by door to door delivery (Pitcher Report, p. 163).

(c) That there are 189 milk distributors in New York City, selling to stores, where the one cent differential is involved, each of whom sells more than 1,500 quarts daily. These distributors average 18,519 quarts of milk per day (Pitcher Report, p. 165).

The Committee expressly pointed out the absence of any element of monopoly:

"Although the number of milk distributors has tended to diminish and a few companies to emerge as the dominant factors in the various markets, there are few cities in the United States and *none in New York State* where any one company has a monopoly or near-monopoly of the business." (Pitcher Report, p. 165)

"During the past two years, the trend toward a decreasing number of distributors in most cities has been reversed, particularly in those cities where strict sanitary requirements are not enforced. Even in New York City 70 milk distributors started in business between November, 1932, and January, 1933, and only 28 discontinued operation during the same period." (Pitcher Report, pp. 166-7)

"* * * competition has not as yet given way to monopoly in any of the cities of this state. Recently on account of unusual and probably temporary conditions the number of distributors has tended to increase. *Competition is keen to the point of being wasteful and destructive.*" (Pitcher Report, p. 180) (Italics ours.)

8. It results in no benefit to the farmers.

The price paid to the farmer for his milk is the same irrespective of the retail price at which the milk is sold. He gets the same price for milk sold under appellant's trade name as for that which sells one cent cheaper (Record, p. 89). He does not get the benefit of the differential although it was in his interest that the Milk Control Law was passed.

The Court below suggested that the farmer might be benefited because more milk might be sold at the two price system than if all milk were required to be sold at the higher price. Obviously, this is no more than an argument that the proper price for all is the lower price permitted to appellant's competitors. It is no justification for the differential.

9. It is economically indefensible.

The one cent differential, in effect, permits appellant's competitors to continue the "destructive trade practices" which the Law aimed to prevent. The statute by its terms requires the Commissioner to determine "what are reasonable costs and charges" and what prices "will best protect the milk industry in the State," and on the basis of this determination to fix the minimum prices. Such prices are the ones which the appellant and the other dealers selling well advertised brands are required to charge. The law further provides that the price "shall not be fixed higher than is necessary to cover the costs of ordinary efficient and economical milk dealers, including a reasonable return upon necessary investment" and further that the fact that some dealers not having a well advertised trade name are permitted to sell at one cent less "shall not require fixing of the price higher than would otherwise be necessary." It is apparent that if the price which the Commissioner has fixed for the appellant's milk is reasonable and will best protect the milk industry, the 10% lower price which the appellant's competitors are per-

mitted to charge must be unreasonable and not designed to protect the milk industry.

Furthermore, the introduction of the one cent differential must inevitably add enormously to the difficulty of enforcing the broad price fixing provisions of the statute, if it does not render such enforcement impracticable. The theory underlying this inconsistent provision is contrary to the whole purpose and intent of the statute and cannot fail to contribute to the defeat of the enforcement of its sound provisions.

10. It has no relation to the emergency giving rise to the Milk Control Law.

The inconsistency pointed out above between the one cent differential and the other provisions of the law is occasioned by the fact that the differential has no relation to the emergency which the law was designed to alleviate. The law established state-wide price regulation to protect the interests of the entire people in an industry of vital importance. The application of the law was uniform with the sole exception of the differential. The latter was inserted, not to further the rehabilitation of the industry as a whole, but solely to meet the demands of a particular local group. In consequence, the principle, once established, will hold good, irrespective of any emergency.

From the foregoing it is clear that the discrimination has no other basis than a difference in reputation or good will. Two competitors may be in all respects alike, but if one has a "well advertised trade name" he is compelled to sell at a higher price and is not permitted to meet on equal terms the competition of a rival dealer. The differential has in purpose and inevitable effect the imposition of a penalty upon the reputation of one competitor—upon the good will which constitutes one of his most valuable assets. Such a discrimination is arbitrary and unreasonable and takes from him his property without due process and denies him the equal protection of the laws.

II.

The provision for the one cent differential represents a new departure in governmental regulation and is of a character which has never been sanctioned by this Court. The principle involved is unsound and its approval will lead to far-reaching and dangerous consequences.

In *Nebbia* vs. *New York, supra,* this Court sustained the validity of the 1933 Milk Control Law in its broad aspects. It held that the Constitution did not forbid the imposition of compulsory minimum prices at which milk might be sold in New York State during the emergency period therein provided. That case was directly concerned only with those features of the law which operated alike upon all dealers of the same type. The provision for the one cent differential was not then under consideration.

In that case the Court approved a differential between the price of milk on door to door delivery and the price of milk sold from stores. As pointed out by the Court such differential is justified by a difference in the quality and cost of the services rendered—factors entirely lacking in the one cent differential. The differential in that case met the test previously laid down that a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (*Royster Guano Co.* vs. *Virginia,* 253 U. S. 412, 415.)

The provision for the one cent differential wholly fails to meet these fundamental requirements. It is an anomalous and inconsistent provision grafted upon the main statute before passage as a result of insistent pressure by a particular group. It bears no real relation to the main purposes of the statute. Furthermore, it is arbitrary and discriminatory, in that it prescribes different prices for the same product, the distinction being based solely upon the possession of a well-advertised trade name.

The issue presented is fundamental and of great importance. The introduction of governmental price fixing into a highly competitive industry like the milk business is, of itself, in the nature of a hitherto untried experiment, which must necessarily disturb existing economic laws and relations. And this is true even if the utmost care be taken to see that the price regulations bear equally upon all parties similarly circumstanced. But if, before the statute even has a trial, the Legislature yields to the pressure of one particular group and attempts to adjust the ordinary and familiar differences in business relationships by discriminations in price between individual competitors, the situation will lead to chaos and in the process work irreparable injury.

Most important of all, once the principle is established, it is capable of indefinite extension. Subsequent development is only a matter of degree. The one cent differential in this case was not the result of any Legislative investigation or fact finding. If one cent, why not two, or three cents? The door is opened for all sorts of particular groups and interests to press upon the Legislature their demands for favors and preferences which will aid them in their efforts to gain some advantage over other competitors. The history of such movements is only too familiar.

If the one cent differential is sustained for milk, it must logically be sustained for bread, for meat, for clothes, for gasoline, for any one of a vast number of basic products and services. Can the Legislature safely be permitted, under the pressure of minority groups, to determine one man's bread is to enjoy a preference against another's irrespective of quality, cost, or other difference of product? If a merchant or dealer has succeeded in building up a reputation and a name for his product, is the Legislature to step in and fix a higher price for [illegible] time allow his competitor to sell a [illegible] price? May one seller with an establish[illegible]utation be denied the right to meet the price of a lesser known competitor?

Let us suppose that two dealers have been in business for a given period under similar conditions. Dealer A has periodically expended a portion of the proceeds of his business in advertising his product and has built up a well advertised trade name. Dealer B, on the other hand, has made no such expenditure, but has either retained his profits or disposed of them in salaries or dividends. Can the Legislature properly limit Dealer A to sales at a fixed minimum price and authorize Dealer B to sell at a price below that fixed for Dealer A?

The Court below in sustaining the one cent differential rested its decision largely upon the supposition that the Legislature might have been motivated by the belief that in the absence of the one cent differential "the whole market would fall into few hands." The Court recognized that the statute sought to take from certain distributors "economic advantages which were not only theretofore lawful but which have generally been commended and fostered." Nevertheless it concluded that the Legislature was justified in thus summarily depriving appellant of these advantages because it imputed to the Legislature a belief that "concentration of economic power" might result.

We know of no similar attempt to penalize the normal growth and development of an enterprise solely on the basis of an alleged possibility of a "concentration of economic power," nor do we know of any decision sustaining such a penalty. Were the State Legislature vested with such power, the State would necessarily become a permanent equalizer of competition by adjusting relative business advantages from time to time in such a way as to offset the natural preferences of consumers. The public would be compelled to pay more for the product which it wanted or to abandon it in favor of a less desired product because the Legislature might at some time entertain the belief that one or more concerns were capturing from their less successful competitors what the Legislature regarded as too large a percentage of the market.

The Court below stated that a "concentration of economic power has generally been watched with a jealous eye in this country" and that "to prevent it or to break it up, rather than to regulate it after it arises, has on the whole been our preferred way." This is merely another way of stating that handicaps may be imposed upon an enterprise simply because it is successful—a doctrine disapproved by this Court in *Standard Oil Company* vs. *United States*, 221 U. S. 1, and finally disposed of in *United States* vs. *United States Steel Corporation*, 251 U. S. 417. We have not in the past placed hurdles in the way of growing and successful concerns, so long as the conduct of their business was free from just criticism.

In passing, it is to be noted that this Court has held that the possibility of monopoly without more does not justify price regulation even if it be of uniform application. *Fairmont Creamery Co.* vs. *Minnesota*, 274 U. S. 1; *Williams* vs. *Standard Oil Company*, 278 U. S. 235. Price regulation resulting in a direct subsidy to one enterprise at the expense of another competitor is even less entitled to support.

In view of the novel situation here presented we have been able to find no authorities precisely governing the present case. But we know that this Court, while disposed to exercise sparingly its power of interference, has time and again refused to sanction attempts by State Legislatures to use their sovereign power in a discriminatory fashion.

Thus the power to regulate the great stock yards was not long established when a State Legislature attempted to fix the rates to be charged by stock yards in Kansas which handled more than a specified number of live stock each day. The specified number was so chosen as to exclude all the stock yards but one. This Court held such attempt at special privilege invalid.

Cotting vs. *Kansas City Stock Yards Company*,
183 U. S. 79.

The power of the State Legislature over railroad rates has many times given rise to attempts to prescribe rates for certain favored products, which rates were non-compensatory although the sum of all rates might give a fair return. This Court has consistently held these attempts invalid.

Banton vs. *Belt Line Railway Corporation*, 268 U. S. 413;
Northern Pacific Railway vs. *North Dakota*, 236 U. S. 585;
Norfolk & Western Railway vs. *West Virginia*, 236 U. S. 605;
Northern Pacific Railway vs. *Department of Public Works*, 268 U. S. 39.

Soon after it became established that the States might regulate motor bus transportation of persons or property by requiring the giving of bonds and insurance policies for the protection of the public, a State Legislature attempted to except from regulation companies transporting certain favored agricultural products. This attempt to discriminate in the exercise of governmental power was held invalid.

Smith vs. *Cahoon*, 283 U. S. 553.

The right to impose different taxes upon chain stores from those imposed upon single unit stores was scarcely upheld when this Court had to hold invalid an attempt to push the new power to the limit by drawing the line at county boundaries.

Liggett Company vs. *Lee*, 288 U. S. 517.

These and numerous other cases illustrate attempts by State Legislatures to use new forms of governmental regulation for the benefit of a privileged group. The present case is different from *Cotting* vs. *Kansas City Stock Yards Company, supra*, only in that in this case four companies are discriminated against instead of only one. Philosophi-

cally, the issue is the same in all of these cases. This issue is whether or not the power of government may be used to aid or injure particular individuals or groups when there is no substantial difference between them, or the difference is inadequate to support the distinction.

In the cases where this Court has sustained treatment by State Legislatures of one group differently from another it has always done so upon the basis that there was a substantial difference between the groups and that this substantial difference had a proper relation to the difference in treatment.

In *Tax Commissioners* vs. *Jackson*, 283 U. S. 527, this Court sustained a State tax upon stores which was graduated according to the number of stores under a single ownership and management. The tax clearly imposed a different burden upon chain stores from individual stores. In sustaining that tax this Court found that "the record shows that the chain store has many features and advantages which definitely distinguish it from the individual store dealing in the same commodities." This Court enumerated a series of differences between the chain stores and individual stores, differences in management, methods of distribution, policies, accounting methods.

The record in the present case shows no substantial difference between the appellant and its favored competitors. No such differences exist. As we have pointed out, this discrimination would be effective as between milk dealers which were in every respect identical with the sole exception that one had and one had not that uncertain thing called a "well advertised trade name."

There was a real difference between persons and corporations carrying on the business of refining sugar and molasses on the one hand and planters and farmers grinding and refining their own sugar and molasses on the other hand (*American Sugar Refining Co.* vs. *Louisiana*, 179 U. S. 89); between warehouses situated on the right of way of a railroad and those not so situated (*Cargill* vs. *Minne-*

sota, 180 U. S. 452); between a great meat packing house on the one hand and wholesalers and commission merchants on the other (*Armour Packing Co.* vs. *Lacy,* 200 U. S. 226); between hand laundries on the one hand and steam laundries on the other (*Quong Wing* vs. *Kirkendall,* 223 U. S. 59); between private bankers lending money at high rates upon salaries and household furniture on the one hand and commercial bankers lending money upon commercial securities on the other (*Bradley* vs. *Richmond,* 227 U. S. 477); between luxury theatres charging a high admission and low priced theatres (*Metropolis Theatre Co.* vs. *Chicago,* 228 U. S. 61); between the local tradesman and the itinerant dealer (*Singer Sewing Machine Co.* vs. *Brickell,* 233 U. S. 304).

A tax which imposed a different burden upon retail dealers offering coupons, profit sharing certificates and the like from those who did not offer such coupons or profit sharing certificates was sustained in *Rast* vs. *Van Deman & Lewis Co.,* 240 U. S. 342. Here again the reality of the difference between the methods was obvious to anyone familiar with the merchandising methods of that period. Again a tax was involved. In this case it is not a tax. Above all in this case, as we have pointed out, there is no suggestion that methods of advertising are to be regulated, that this appellant could avoid the discrimination against it by any change in method or quality or quantity of its advertising.

All of the foregoing cases and numerous others reveal that where differences in treatment have been sustained they have been sustained because there was a difference in fact. The difference was one of substance. In this case there is no suggestion of any such difference anywhere in the record.

Furthermore, it is particularly to be noted that practically all of these cases were tax cases. In supporting the chain store tax in *Tax Commissioners* vs. *Jackson, supra,* this Court gave emphasis to the fact that a tax was involved and that "the power of taxation is fundamental

to the very existence of the government of the states." A tax is very different from the regulation of prices. The collection of revenue is essential to the continuance of the state governments; the distribution of business between competing milk dealers in a single locality is in no sense essential for that purpose. In sustaining various types of taxes this Court has taken cognizance of the great difficulties experienced by governments in finding new subjects of taxation and in obtaining from them an adequate revenue while at the same time distributing with reasonable justice the burden among the citizens and businesses located within their borders. Discretion must be allowed to a state government for this purpose. The difficulty of the task requires it.

In the cases above cited the State has, in the discharge of its own necessities, fastened upon a substantial difference in classification as a justification for taking, in taxes, a different share of the ultimate proceeds of the business. Meantime competitive conditions between individual competitors, including prices to be charged, were not interfered with. But we know of no case in which the State has stepped into the market place and arbitrarily fixed different prices at which competitors similarly circumstanced might sell the same product.

The basic distinction between the legitimate fields for the exercise of the taxing power and of the police power of the States was pointed out by this Court in *Connolly* vs. *Union Sewer Pipe Company*, 184 U. S. 540, where it said:

> "The decision now rendered is not at all in conflict with the views expressed in the two cases just cited. It is sufficient to say that those cases had reference to the taxing power of the State, and involved considerations that could not, in the nature of things, apply to a State enactment like the one involved in the present case. The power to tax persons and property is an incident of sovereignty, and the extent to which it may be exerted has been indicated in numerous cases. * * * But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the

> pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity'' (Page 562).

The Legislature can and should take proper measures to see that competitive conditions in general are free from improper restrictions and fair and equal. But if it is to be free to intervene in each competitive group in each community and to discriminate between different competitors by arbitrarily establishing different prices for the same article, the result will be chaotic, and the door will be opened to political intrigue, to the pressure for advantage of one group against another, and to oppression. A fundamental principle is involved which far transcends in importance the particular injury now suffered by this appellant.

III.

The one cent differential is not an integral part of the Milk Control Law and may be declared invalid without invalidating the remainder of the statute.

As we have pointed out, the one cent differential is not an essential nor even a proper part of the price fixing structure established by the Milk Control Law. The bills recommended by the Pitcher Committee and by the Milk Control Board made no mention of it and in similar legislation in other States it finds no place. It can be excised without invalidating the remainder of the statute.

Furthermore, in the very section in which provision is made for the differential the Legislature expressly provided that if any part of the statute should for any reason be adjudged to be invalid, such judgment should not affect,

impair or invalidate the remainder of the statute but should be confined in its operation to the part involved in the controversy in which such judgment should be rendered. There is nothing in the statute to rebut the resulting presumption that the Legislature would have enacted the statute without regard to the one cent differential.

Champlin Refining Company vs. *Commission,* 286 U. S. 210;
Smith vs. *Cahoon, supra.*

It is respectfully submitted that the decree of the United States District Court for the Southern District of New York should be reversed and a final decree entered for the appellant in accordance with the prayer of the bill of complaint.

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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 296.

BORDEN'S FARM PRODUCTS COMPANY, INC.,
Appellant,

against

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, et al.,
Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR APPELLANT.

WALTER E. HOPE,
Counsel for Appellant.

TIMOTHY N. PFEIFFER,
JOHN E. LOCKWOOD,
EDGAR P. BAKER,
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Statement.

The brief for the respondents concedes that there is no issue of fact (p. 1), and that the only question involved is the constitutionality of the provision for the one cent differential (p. 2). It further concedes that this provision is separable from other parts of the Milk Control Law and may be declared invalid without invalidating the remainder of the statute (p. 2).

The sole argument advanced in support of the provision for the one cent differential is that it "is intended, not without reason, as a safeguard against monopoly".

We have already pointed out in our main brief the inherent improbability of any monopoly. But even if, for the sake of argument, it be conceived that some such apprehension may have been entertained, it does not justify the arbitrary and discriminatory method adopted by the Legislature in the provision for the one cent differential.

Argument.

I. In the first place, it is to be seriously questioned whether price discrimination based solely upon a desire to prevent possible monopoly (or "concentration of economic power") is a legitimate exercise of the police power of the State. It may be readily conceded that a Legislature may enact measures to protect the public from the evils of monopoly. Such measures are, however, directed to the preservation of a free competitive market. They do not properly extend to the forced allocation of business between competitors by the fixing of varying prices at which competitors may sell the same article. Monopoly is not a necessary attribute of size or the successful operation of a business; it exists only where obstacles have been erected in the paths of others who, but for those obstacles, might become competitors. The Legislature may remove these obstacles, when they are improper or detrimental to the public, and thus preserve equality of competition. It may not set up a system of handicaps between individuals, based on its own judgment of their respective chances of success.

The difference between assuring a fair opportunity to compete and granting to one competitor a direct price advantage over another in the sale of the same product requires no elaboration. One is a valid exercise of the police power of the State; the other is undisguised legislative preference in favor of a particular individual or group.

II. Respondents' brief devotes considerable space to a discussion of classification in support of the proposition

that the possession of a "well advertised trade name" constitutes a reasonable basis for classification in fixing a discriminatory price differential. The brief ignores the distinction between classification for the purpose of taxing or regulatory statutes, on the one hand, and for the purpose of price fixing on the other.

Classification for the purpose of price fixing presents a problem distinct from that raised in the cases cited by respondents relating to classification for purposes of taxation or regulation. The effect of classifications established in taxing and regulatory statutes is essentially different from that in price fixing measures.

The extent of the power of classification for purposes of taxation has frequently been considered by this Court and is discussed in our main brief at pages 24 to 26. The States have also been granted considerable latitude, although perhaps in lesser degree, in making classifications in the exercise of their ordinary regulatory powers. The necessities of the State and the complexity of the problems which the Legislature must meet, as well as the difficulty of drawing dividing lines with absolute precision, have afforded justification for the latitude permitted in the making of such classifications. Practical considerations have been difficult to evaluate and the unequal burdens complained of have been for the most part incidental and frequently what the Court has described as "mere hypothetical and fanciful illustrations of possible discriminations which had had no basis in the actual experience to which the Statute was addressed" (*Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 372).

It is submitted that legislation for price fixing presents a different situation. Price regulation by Government imposes on the individual a direct and continuing burden which cannot be compensated. As this Court pointed out in *Tyson & Bro.* v. *Banton*, 273 U. S. 418, 430, the power to fix prices "is not only a more definite and serious invasion of

the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on".

Price is the determining factor in the sale of any product. To speak conservatively, it is a delicate, not to say dangerous subject for governmental intervention. But if the Government is bound to intervene, it should be for compelling reasons and the measures adopted should be based on sound and not fanciful grounds. Classifications for purposes of price fixing should be founded on cost or quality of the product sold or the character of the services rendered; otherwise they have no adequate relation to the limited purpose by which legislative price-fixing is justified. A classification based upon the possession of a "well advertised trade name" is too slender to support the drastic and discriminatory price distinction embodied in the one cent differential.

It is noteworthy that respondents have little to say in favor of the device represented by the one cent differential. This is not surprising, in view of the fact that it threatens the demoralization of the proper administration of the entire statute. In effect it perpetuates many of the evils of destructive price cutting, which the Law was specifically intended to correct. Respondents' brief comments upon the difficulties encountered by the Government in its experiments with price fixing and concludes, "Apparently the fixing of prices by government discovered as many troubles as were loosed from Pandora's box". The fact that these troubles are inevitably encountered does not justify so arbitrary and discriminatory a solution as the one cent differential. If, upon the demand of self-interested groups, State Legislatures are to be free, under the guise of an alleged "classification", to fix varying and discriminatory prices for competitors selling the same article under similar conditions in the same field, we fear that Pandora's box may prove quite inadequate.

III. In the concluding paragraph of *Nebbia* v. *New York*, 291 U. S. 502, 539, this Court stated:

> "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt and hence an unnecessary and unwarranted interference with personal liberty."

The provision for the one cent differential meets none of these tests. We have pointed out that it is arbitrary and discriminatory, in that it has no relation to cost, either the general cost of the business or the cost of appellant's advertising; it has no relation to quality; it has no relation to service; it forms no part of the carefully considered plan presented by the investigating bodies formed for that purpose; and it is economically indefensible.

Furthermore, it is irrelevant to the policy and avowed purpose of the Legislature in enacting the legislation. It bears no relation to the emergency which gave rise to the legislation. The one cent differential results in no benefit to the farmer, for whose relief the bill was specifically intended. In fact, it is becoming increasingly evident that, by perpetuating the destructive practice of price cutting, it is demoralizing the effort to administer the law and may well bring about the defeat of its well-intended provisions.

The principle involved is important and far reaching in its consequences and implications. We submit that there is nothing in this case which should lead this Court to place upon it the stamp of its approval.

Respectfully submitted,

WALTER E. HOPE,
Counsel for Appellant.

TIMOTHY N. PFEIFFER,
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EDGAR P. BAKER,
of Counsel.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 296

BORDEN'S FARM PRODUCTS COMPANY, INC.,
Appellant,

vs.

CHARLES H. BALDWIN, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

CONCESSION AS TO JURISDICTION AND JOINT MOTION TO ADVANCE.

TIMOTHY N. PFEIFFER,
Counsel for Appellant.
JOHN J. BENNETT, JR.,
HENRY S. MANLEY,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

CONCESSION AS TO JURISDICTION AND JOINT MOTION TO ADVANCE.

Heretofore the appellant has served upon the undersigned solicitors for the appellees a jurisdictional statement as required by the rules of this Court. The solicitors for the appellees acknowledge such service, concede that the jurisdictional statement is true and correct and that the appeal is properly taken and within the jurisdiction of the Court, and state that no statement in opposition to

jurisdiction will be filed on behalf of the appellees or any of them.

The appeal is entitled to preferred and speedy determination under section 380 of Title 28 of the United States Code (Jud. Code, § 266) and under the rules of this Court. The question involved is the constitutionality of a provision of the New York State Milk Control Law which affects to the extent of one cent per quart the price of a large volume of milk sold by the appellant and three other companies in the City of New York. Whether this price differential is constitutional and shall continue is a question of great importance to a large number of milk dealers doing business in that city, and is of considerable importance in the administration of the Milk Control Law. It is desirable that the question be finally determined without unnecessary delay.

It is respectfully prayed that probable jurisdiction be found and the appeal advanced and set down for argument on November 5 or November 12, 1934, or on such other date as the Court shall direct.

Dated September 15, 1934.

MILBANK, TWEED, HOPE & WEBB,
Solicitors for Appellant.
TIMOTHY N. PFEIFFER,
Of Counsel for Appellant.
JOHN J. BENNETT, JR.,
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BORDEN'S FARM PRODUCTS COMPANY, INC.,
Appellant,

against

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, and others,

Respondents.

BRIEF FOR RESPONDENTS.

The appeal is from a decree of the United States District Court for the Southern District of New York, which denied an interlocutory injunction and dismissed the bill of complaint. (R. 119-121.) The decision was by three judges under the provisions formerly found in Judicial Code §266. The opinion below is reported at 7 F. Supp. 352. (R. 113-118.) There is no issue of fact, the one answering affidavit being concerned only with presenting the factual setting to which the statutory provision is addressed and in the light of which its constitutionality is to be determined. (R. 90- 113.) Probably those matters are of such nature that they could have been brought before the Court without any

pleading. The same general observations apply to the three affidavits in support of the bill of complaint (R. 70-77, 78-84, 85-90); the essential allegations of fact other than those of which the Court takes judicial notice are presented by the bill of complaint. The litigation involves nothing except one narrow question of constitutional law, fully and completely presented upon the motion to dismiss.

Question, and Summary of Argument.

The one question presented is the constitutionality under the Fourteenth Amendment of the following statutory provision (ch. 126 of N. Y. Laws of 1934, section 258-q, last sentence):

> "It shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-three has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city."

We concede the correctness of Point III of appellant's brief (pages 26-27) to the effect that the "unadvertised differential" is separable from other parts of the Milk Control Law, and may be declared invalid without invalidating the remainder of the statute.

Our argument upon the constitutional question will be presented under a single point heading and is to the effect that the statutory provision quoted above is intended, not without reason, as a safeguard against monopoly.

No question arises upon the *orders* of the milk control officials. At page 3 of appellant's brief they are referred to as being involved in the issues, but we believe nothing is intended except to call attention to the fact that the price orders repeat and recognize the differential which has its source in the statutory provision. (R. 37-38, paragraph 11; 38-39.) Although the moving papers expressed some dissatisfaction with Order No. 12 which identified and listed the "advertised" dealers (R. 34-35, 71-72, paragraph 9), the answering affidavit says that the classification was based upon complete agreement in the milk industry (R. 92, paragraph 7), and appellant's brief at page 7 says: "The correctness of the determination upon which this order is based is not in issue in this action, but it is not admitted by the appellant."

Facts as to the Appellant.

It appears to be conceded and is the fact that if a distinction between "advertised" and "unadvertised" dealers is valid, the appellant falls into the former class. (R. 3, "Ninth"; 71, paragraphs 5, 6.) Its sales and its advertising center about New York City, where it sold daily in 1933 upwards of 600,000 quarts of bottled milk, about two-thirds by retail delivery direct to consumers and about a third through stores. (R. 70-71, paragraphs 4-7.) There are more than 150 other

milk dealers competing for this store business, which is highly competitive. (R. 71-72, paragraphs 8, 9.) Only three of those competitors are classified with appellant as handling "advertised" brands. (R. 34-35; 92, paragraph 7.)

Accordingly, and by reason of the statutory provision against which it complains, appellant is subjected to competition by about 150 competitors who are permitted to sell milk to stores in New York City at a cent below the minimum prices applicable to appellant and three others. The great volume of milk business in New York City is in quart bottles of Grade B pasteurized. The minimum (and apparently universal) prices effective in New York City for such milk at the time when this action arose were as follows (R. 36):

	Advertised	Unadvertised
Retail sales, delivered to consumer either by milk dealer or store	12 cents	12 cents
Retail sales, store to consumer without delivery. Bottle deposit required	11	10
Wholesale sales, dealer to store	10	9

Appellant asserts that by reason of its competitive disadvantage as an "advertised" dealer under those circumstances its store sales are impaired to the extent of 25,000 quarts per day and its house sales are impaired to the extent of 50,000 quarts per day. (R. 9; 80-81, paragraphs 6, 7.) Those allegations indicate that the appellant lost an eighth or a ninth of its business in New York City during the first twelve months of milk control, all due to the operation of the "unadvertised differential". For present purposes the allegations are undenied.

Facts Relevant to Legislative Purpose.

It is agreed that for a year or more before enactment of the 1933 milk control law (Ch. 158 of N. Y. Laws of 1933, effective April 10, 1933) there was price competition in the selling of bottled milk to New York City stores, with a tendency for "independent" dealers to buy for less and sell for less than the appellant. (R. 87.) The only possible difference is concerning the language most appropriate to describe that condition with relation to its causation and uniformity. Appellant denies that there was any "customary and accepted difference in price" between its milk sold under the trade name "Borden's" and the milk of its competitors, but says (R. 88-89):

> "In the price war above described there may have been periods when some of the dealers were selling their milk in bottles at a price below the plaintiff's price. If so, this was because of plaintiff's determined effort to preserve the price structure and to prevent the growing chaotic condition. Plaintiff was, however, accustomed from time to time to adjust its price and was forced to adjust its price to meet this type of competition. * * * The one cent differential is the sole remaining evidence of the price discriminations prevailing during the price war."

The fact, stated as above in the pleading on behalf of the plaintiff-appellant, is stated as follows in the Pitcher Report (1933 N. Y. Legis. Doc. No. 114):

> "In 1932 less than 10 per cent of the stores were getting as much as the retail price on routes, 42 per cent were selling at a discount of one cent, 25 per cent at a discount of two cents, and 20 per cent at a discount of three cents from the route price." (Page 249.)

"Many charges and counter charges have been made during the past year in respect to the responsibility for price-cutting in the sale of milk to stores in New York City. It is common knowledge that the two large companies [Borden's and Sheffield] make relatively fewer concessions from established sales prices than do the smaller distributors. The principal reason for this difference is that their milk is sold under well-known brands or trade names which have come to signify extra value in quality and service. Stores find it to their advantage to carry these brands of milk because they are so often called for by the customers. Another reason may be that these larger companies are interested primarily in retail distribution and do not care to take on more wholesale business unless it will pay its way. Sales prices of milk distributed by the Dairymen's League Co-operative Association in New York were in practically the same range as those of the independent dealers. This is to be expected, since the Association has only recently undertaken to establish its own brand of fluid milk in New York, and since the distributing facilities and trade of the Association have been acquired within the past few years by purchase from independent dealers." (Pages 253, 257.)

This statement is supported by Tables 104 and 107, pages 258-259. The former gives the following data as to the percentage of New York City stores served in 1932 with Grade B bottled milk at prices less than 9 cents per quart, at a time when the route or house price was 12 cents:

Borough	Borden's	League	Sheffield	Others	Total
Bronx					
Brooklyn	3.2	100.0		75.5	54.2
Manhattan				14.3	4.6
Queens		75.0		52.7	32.7
Richmond				3.6	3.0
All boroughs	0.8	40.9		39.7	24.4

The names of the dealers which enter into that tabulation, and the prices below 9 cents at which they made their sales, appear from Table 107. Sheffield was maintaining a price of 9 cents or more, Borden's made relatively few concessions from it, and the League and independents, particularly in Brooklyn and Queens, sold mostly at 8 cents.

That was the practical situation which confronted the New York Legislature and the milk dealers when this price-fixing law came on for enactment in April, 1933. The independents were to be deprived of their buying advantage by compelling all dealers to buy from producers at prices fixed according to utilization of the milk. That regulation was logical and apparently fair, but it involved a stern readjustment of former competitive conditions.

Should the independents be deprived of their selling advantage as well as their buying advantage? It was arguable that they were ruined by either answer to that question, but particularly by the affirmative answer. In New York City the "Big Three" already had two-thirds of the milk business, and there was a tendency to further concentration. (R. 91, paragraph 4.) Borden's and Sheffield were selling advertised brands upon the appeal built up by advertising, and the League was attempting to establish a similar position for its brand. Much advertising was of the "fear" type, suggesting that no milk was clean or safe except that of the advertisers. The independents were relying upon price appeal, and selling through stores mostly at a cent a quart below the Sheffield-Borden price. What would happen to the independents if they were compelled to sell in a flat price market?

For present purposes the representations made to the 1934 Legislature at the hearing of March 23 are most relevant. Those are in the present record. (R. 93-94, paragraph 11; 94-113.) There is no record of the representations made in April, 1933 (R. 92, paragraph 6) but it may be assumed that they proceeded along the following lines:

> "Any way you look at it some of these independent dealers are in for a hard time. If they sell at a price of one cent less than the advertised brands, either they lose money or the large company makes too much money, assuming equal efficiency. If they are required to charge the same price, some of these independent dealers say the public will favor the brand of milk which is widely known and widely advertised. I do think it is a very difficult question to decide." (Dr. Parran, R. 96.)
>
> "I refer to the question of the sale of unadvertised brands of milk in New York City. * * * The very life blood of the independent dealers of New York City depends entirely upon the continuation of that provision in last year's bill." (Hugh W. Taylor, R. 98.)
>
> "We always retained or got the same price on our canned [bulk] milk that Borden and Sheffield got for theirs. We had the same grade of milk. It was a scare that went among the small dealers, that they felt that they were going to lose all their business." (William J. McKay, R. 100-101.)
>
> "You know the large companies in New York City * * * when you talk milk all you hear is Sheffield and Borden's. The big companies spend thousands of dollars on the radio. * * *Where do you think the store business, after you take it away from me, will go? * * * It will be absorbed by the big companies. It will put out the independent producer from our plant because we wouldn't be able to handle his products. Then what? Again the mercy of the big three to do whatever they damn please as it was shown prior to the enact-

ment of this Pitcher Bill." (Julius Marcus, R. 102-104.)

"All that we ask is a square deal for the independent distributor. We are being legislated out of business. Last year we had the same thing. The Big Three opposed us. We had it out. We found it was equitable. It was enacted in the law." (Irwin Kotcher, R. 106.)

"I say that you must maintain the independent dealers as a gauge of what is economy in the milk business, because the independent man when he operates his business and operates it for himself is attempting to effect whatever reasonable economies he can for himself. * * * We say that you must maintain the independent dealer because he gives you a true picture of what actually is. He must. He feels as if the big fellows want the entire business." (Paul Balsam, R. 110-111.)

POINT I.

The "unadvertised differential" provision is intended, not without reason, as a safeguard against monopoly.

A legislature in its exercise of the police power has the burden of determining whether a specific danger to public welfare exists and what measure is reasonably suited to averting that danger. The courts will not lightly disturb a legislative determination upon either question. Frequently it is said that if the correctness of the legislative determination is even debatable, and not clearly arbitrary, it will be undisturbed. *Purity Extract Co. v. Lynch,* 226 U. S. 192, 201-202, 204, 205; *Patsone v. Pennsylvania,* 232 U. S. 138, 144; *Price v. Illinois,* 238 U. S. 446, 452, 453; *Hebe Co. v. Shaw,* 248 U. S. 297, 303; *Euclid v. Ambler Co.,* 272

U. S. 365, 388; *Graves v. Minnesota,* 272 U. S. 425, 428; *Ohio ex rel. Clarke v. Deckeback,* 274 U. S. 392, 397; *Standard Oil Co. v. Marysville,* 279 U. S. 582, 584, 586; *Silver v. Silver,* 280 U. S. 117, 123; *Sproles v. Binford,* 286 U. S. 374, 388-389; *Gant v. Oklahoma City,* 289 U. S. 98, 102; *Home Bldg. & L. Assn. v. Blaisdell,* 290 U. S. 398, 447-448; *Nebbia v. New York,* 291 U. S. 502, 537. Whether the Court always adheres in practice to that rule has been a matter of difference within the Court in some cases where legislative determinations have been overturned. *Adams v. Tanner,* 244 U. S. 590, 599-600; *Burns Baking Co. v. Bryan,* 264 U. S. 504, 519-520; *Weaver v. Palmer Bros.,* 270 U. S. 402, 415; *Tyson & Brother v. Banton,* 273 U. S. 418, 447-448; *Liggett Co. v. Baldridge,* 278 U. S. 105, 115; *New State Ice Co. v. Leibmann,* 285 U. S. 262, 285; *Liggett Co. v. Lee,* 288 U. S. 517, 547-569, 585-586. Either list of cases could be greatly extended, and would lead only to the conclusion that all members of the Court recognize the same general rule for the separation of the judicial from the legislative power, but its application is not free from uncertainty. To restate the rule, the wisdom of a statute is not a factor for determining its constitutionality except where the Court regards the statute as grossly unwise.

The device of classification, with the application of different regulations for different classes, is a common device of the law. "Classification is the most inveterate of our reasoning processes." (Chief Justice Taft, in *Truax v. Corrigan,* 257 U. S. 312, 337-338.) It is valid unless it is "without any reasonable basis"; it need not be done with "mathematical nicety"; one who assails the classification "must carry the burden of

showing that it does not rest upon any reasonable basis, but is essentially arbitrary". (Mr. Justice Van Devanter, in *Lindsley v. National Carbonic Gas Co.*, 220 U. S. 61, 78-79.) The statute is good so long as it does not "preclude the possibility of a rational basis for the legislative declaration." (Mr. Justice Stone, in *Ohio ex rel. Clarke v. Deckeback*, 274 U. S. 392, 397.) Exactness in classification cannot always be obtained, and a tendency to fairness is enough, as is illustrated by *Singer Sewing Mach. Co. v. Brickell*, 233 U. S. 304. "The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction." (Mr. Justice Roberts, in *Bd. of Tax Comrs. v. Jackson*, 283 U. S. 527, 537.) See also *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 160-162; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571; *Miller v. Wilson*, 236 U. S. 373; *Dominion Hotel v. Arizona*, 249 U. S. 265; *Whitney v. California*, 274 U. S. 357, 369-372; *Bain Peanut Co. v. Pinson*, 282 U. S. 499; *Continental Baking Co. v. Woodring*, 286 U. S. 352, 371-373. In *Nebbia v. New York*, 291 U. S. 502, Mr. Justice Roberts said:

> "The difference in the retail price he [Nebbia, a grocer] is required to charge his customers from that prescribed for sales by distributors is not on its face arbitrary or unreasonable, for there are obvious distinctions between the two sorts of merchants which may well justify a difference of treatment, if the legislature possesses the power to control the prices to be charged for fluid milk." (521.)
>
> "In the order of which complaint is made the Milk Control Board fixed a price of ten cents per quart for sales by a distributor to a consumer, thus recognizing the lower costs of the store, and endeavoring to establish a differential which would be just to both. In the light of the facts

> the order appears not to be unreasonable or arbitrary, or without relation to the purpose to prevent ruthless competition from destroying the wholesale price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk." (530.)

That the provision now in question is limited to New York City does not condemn it. Clearly it was directed to conditions peculiar to that city, just as many other laws have been. *People ex rel. Einsfeld v. Murray*, 149 N. Y. 367; *Tenement House Dept. v. Moeschen*, 179 N. Y. 325, 335, affirmed 203 U. S. 583; *Adler v. Deegan*, 251 N. Y. 467; *Packard v. Banton*, 264 U. S. 140, 143-144. Such a provision is needed only in a great metropolitan market, where a large volume of milk is sold through stores, the trade being shared between large and well-known dealers who obtain a higher price for their product and comparatively unknown dealers who rely for sales upon offering their goods at a lower price. Those conditions, plus the recent abolition of "bulk" milk (R. 115), are found in New York City and probably nowhere else in the same degree. That is sufficient reason why this provision has not been copied into the milk control laws of other States, as is commented upon in appellant's brief, page 12.

That the statutory provision describes a class by reference to advertising is not necessarily a final description of all the differences involved, and it might not be fatal if it were. Such a suggestion was once made by a District Court, but it was reversed. In *Little v. Tanner*, 208 Fed. 605, 611, Judge Rudkin said:

> "The use of trading stamps and similar devices is neither more or less than a legitimate system of advertising, and those who employ that system

> are entitled to the protection of the Constitution of the United States. As well might the Legislature classify separately those who advertise in the columns of the daily papers, by bill boards, or by electrical signs, and impose a tax upon them to the exclusion of others engaged in the same business or calling, who do not so advertise. The attempted classification is purely arbitrary."

That argument was answered, and the decision reversed, in *Tanner v. Little,* 240 U. S. 369, 383:

> "Let it be granted that the 'premium system' is a method of advertising, can there not be differences in advertising which may be subject to differences in legislation?"

It was concluded in that case that the trading stamp device was something more than advertising, and gave businesses using it a peculiar character, justifying a special statutory treatment. See also *Rast v. Van Deman,* 240 U. S. 342. The same is true here. Size and tendency to monopolize the market are incidents which accompany the "well advertised trade name" of milk in the New York City market. There is as good reason to justify a one cent differential between advertised dealers and others as there is to justify the one cent differential between dealers and grocers; each is a recognition of a differential which existed under conditions of free competition and which could not in fairness be summarily discontinued. Like non-conforming buildings existing before a zoning law becomes effective, the differential is a nuisance, but to abate it would be a confiscation.

The national government has experienced some difficulty with its program of price regulation under NRA because of such pre-existing differentials. Various

sorts of sectional differentials have been worked out, and even racial ones, mostly without any basis except the recognition of an existing difference which could not readily be eliminated. The interposition of the President early in 1934 was necessary to settle that Southern mines and factories preserve the lower wage without which they could not co-exist with mines and factories nearer the population centers of the North. Manufacturers of cloth caps and hats in the East, where the minimum wage was fixed by code at 55 cents per hour, were displeased because the West was allowed a lower minimum, of 37½ cents. (N. Y. Times, July 19, 1934, page 27) The National Association for the Advancement of Colored People charged that the codes provided a wage 20 to 40 per cent less to the Negro worker than to the white man doing the same work. (N. Y. Times, July 3, 1934, page 13.) Apparently the fixing of prices by government discovered as many troubles as were loosed from Pandora's box.

One of the most obvious and notable of the troubles introduced by price-fixing is the one now involved. Under ordinary competitive conditions it is an effective device for a dealer to confer upon the goods he handles an individuality and reputation for quality which tends to lift his particular brand above mere price competition. Advertising is the art most employed for achieving that result. There is plenty of evidence that the device is effective. "The Maxwell House Coffee habit of the American people was bought in 1928 for $42,000,000 and the Jell-O habit in 1925 for $35,000,000." (173 Ann. Am. Acad. 81, quoting Robert

S. Lynd.) The device is effective in New York City, where a recent study has shown that 64 per cent of Manhattan consumers ask for particular brands when purchasing groceries. (N. Y. Times, May 15, 1934, page 39.) Such a situation tends to give a prestige monopoly to the brand owner, favoring his goods even when his unadvertised competitors are free to sell for less. The use of "fear" advertising, suggesting perils in using any goods except those well advertised, further submerges the unadvertised competitors.

If prices in any line of goods are fixed at a uniform level, and some of the goods are advertised brands, it requires no foresight to see that the ordinary advantage of the advertised brands will be greatly increased. A special writer in the N. Y. Times of June 18, 1933 (2nd section, page 15) called attention to the fact that advertising should benefit from the codes. Many other persons made similar observations. An exultant article in "Printers' Ink" for October 5, 1933, under the title "Renaissance of Advertised Brands," said:

> "The manufacturers of low-end merchandise have had to raise their prices so much as a result of the new codes that the price differential they formerly enjoyed as compared to advertised brands has been largely wiped out. Naturally, with this price differential practically eliminated, sound retailers prefer to handle the brands which have built up a reputation by consistent advertising to consumers over the years."

An article by Colston E. Warne, 173 Ann. Am. Acad. 78-79 (May 1934) said:

> "Advertising will doubtless flourish under the Recovery economics of limited output and frozen margins. * * * From the consumer's viewpoint,

> industrial monopolization, though probably inevitable, is a net loss. Henceforth, the measure of protection formerly offered by the vigorous independent will be removed or greatly reduced. Having no adequate measure of relative quality, the consumer will drift toward large national advertisers. Small producers will lose the market."

Under those circumstances the small producer has only one real chance for survival. To advertise and seek to overtake the reputation of his well advertised competitor is illusory; he will engage in an expensive race which at best may result in all competing goods being equally well advertised, and that condition is equivalent to having all nations of the world thoroughly armed, with none safer than as though all were completely unarmed. The one real chance for survival is to procure a favorable price differential. That issue arose in connection with the Master Code for Grocery Manufacturers, with the manufacturers of nationally known brands demanding open price regulations for all the industry, and the manufacturers of private brands demanding exemption for their goods. (N. Y. Times, May 13, 1934, 2nd section, page 17.) The retail gasoline code has failed to solve the problem of an appropriate differential between branded and unbranded gasolines, and that is an element in the gasoline price war pending in late October 1934. It is said that dealers in branded gasolines, such as Standard, are willing to sell half-a-cent above unbranded gasolines, but dealers in unbranded gasolines contend that they must maintain a differential of one-and-a-half-cents in order to hold their trade. (N. Y. Times, Oct. 19, page 41; Oct 21, 2nd section, pages 11, 21.)

Such is the problem to which is addressed the statutory provision now involved. We make no argument that this statutory provision is the wisest solution of the problem, but we submit that the choice was for the Legislature. The "unadvertised differential" provision is intended, not without reason, as a safeguard against monopoly. Clearly such a purpose does not condemn a statute. *Northern Securities Co. v. United States,* 193 U. S. 197, 337-338; *Central Lumber Co. v. South Dakota,* 226 U. S. 157; *Liberty Warehouse Co. v. Burley Asso.,* 276 U. S. 71, 90; *Nebbia v. New York,* 291 U. S. 502, 529, 537-538.

It is respectfully submitted that the decree below should be affirmed.

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CHARLES ELM

Supreme Court of the United States

OCTOBER TERM, 1934

No. 296

BORDEN'S FARM PRODUCTS COMPANY, INC.,
Appellant,

—against—

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, et al.,
Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FILED BY GABRIEL KOTCHER, ATTORNEY AT LAW, AS AMICUS CURIAE IN BEHALF OF THE INDEPENDENT MILK DEALERS OF BROOKLYN AND NEW YORK AND INDEPENDENT PRODUCERS OF THE STATE OF NEW YORK

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Opinion Below

The opinion of the United States District Court for Southern District of New York is Reported in 7 Fed. Supp. 352.

The Statute Involved

The statute involved is Article 21 and Article 21-A of the Agriculture and Markets Law of the State of New York of 1934.

The appellant questions the validity of Section 258-q of Article 21-A.

Statement

The action was commenced pursuant to Section 266 of the Judicial Code (Title 28 U. S. Code, Sec. 280) by an application for an interlocutory injunction. The case was heard on such application by a statutory court of three judges. The relief prayed for was denied and the complaint dismissed on the merits. Probable jurisdiction was found by this Court on October 8, 1934.

The sole issue involved in this case is the validity under the "due process of law" and "equal protection of the laws" clauses of the Fourteenth Amendment to the United States Constitution, of that part of Section 258-q of Article 21-A of the Agriculture and Markets Law, which permits dealers in milk not having a well advertised trade name to sell their product in the City of New York to stores and by stores to the consumers at a price one cent less than the price to be charged by dealers in milk of a well advertised trade name.

ARGUMENT

POINT I

The classification bears a fair and substantial relation to the objects and purposes that the legislature sought to accomplish.

1. History of the Statute Involved, and Its Relation to the Purposes of the Milk Control Act.

On March 10th, 1932, owing to the existing emergency in the milk industry, a joint Legislative Committee of the New York Legislature was appointed by joint resolution for the purpose of investigating the milk industry of this State, and the resolution stating the principle objective declares, "to the end that the consumer may be assured of an adequate supply of milk at a reasonable price, both to producer and consumer."

After a preliminary report by this Committee, the Pitcher Bill was introduced, and a joint hearing on this milk control legislation was held before the Senate and Assembly Committees on Agriculture on March 14th, 1933. The hearing lasted from the early afternoon until late that night. There was a general feeling that the proposed bill would not fulfill the objectives. At this point, a resolution was offered from the floor by Mr. Sisson to the effect that representa-

tives of the industry itself should meet and try to work out a workable bill agreeable to all (p. 276—Joint Legislative Hearing held at Albany, March 14th, 1933). The Sisson resolution was adopted and a Committee consisting of the various groups was chosen, including Borden's Farm Products Co., Inc., Sheffield Farms, Inc., and Dairymen's League sitting in as an observer. The Committee commenced its work the following morning in the room of the Agricultural Committee. This representative committee went over the Pitcher Bill section by section. Upon reaching the causes for revocation of license the independent dealers and producers proposed a one cent differential substantially as it now exists. The advertised group opposed this. The work of the Committee proceeded with the understanding that a possible agreement might be reached at the close of the work. Upon the conclusion of its work, the independent dealers and producers again recommended the adoption of a 1c differential between the well advertised and unadvertised brands of milk. The representatives of Borden's, Sheffield Farms, Sheffield Producers and Dairymen's League vigorously opposed this differential. The representatives of the independent dealers and farmers contended that a 1c differential per quart to stores in bottles and from stores to consumers was customary between well advertised and unadvertised brands of milk and that if no such differential were continued, the sales of the independent dealers would drop to such an extent that their business would become unprofit-

able, and they would be forced out of business. The independent dealers also showed that although they sold their milk 1c below the well advertised brands, yet, their returns to the farmers were higher than those paid by Borden's and Dairymen's League, and generally as high, if not higher, than Sheffield Farms returned to the Sheffield Producers. It was also urged for the independent farmers that while the law was intended for the welfare and benefit of all the farmers, the effect of the omission of the price differential in the bill would leave more than half or about fifty thousand independent farmers unprotected and without a market for the sale of their milk. That the proposed milk laws would afford them no relief and would result in even greater distress to them. Some members of the Legislature also urged that the public interest required a reasonable degree of competition, for the independent dealers claimed that they could afford to sell for 1c less, and return the producer more than the dealers of the well advertised brands due to their lower overhead. It was also pointed out that the dealers of the well advertised brands were conducting a campaign of disparaging, invidious and alarming advertising matter under such slogans as:

> You can wash vegetables, but can't wash milk;
>
> That independent dealers were selling the same milk in bottles as they had theretofore sold in cans;
>
> That there was mystery in the milk of independent dealers,

and such other alienating advertising matter.

These hearings lasted for about two days during which it was further shown by the independent dealers and farmers that a uniform price would put the independent dealers out of business before the emergency was over; that the independent dealers would lose the market for the sale of their milk; that the independent producer would consequently lose the outlet for his milk in the class 1 bracket which is used for fluid purposes and brings the highest price, and that the producers selling to the well advertised dealers would enjoy an increase of market; that one group of farmers and dealers would gain an advantage over another, and that the effect of it all would be the creation of a monopoly for the well advertised brands.

However, the dealers of the well advertised brands would not yield. It was then agreed by the various representatives that the representative committee hand in to the Agricultural Committee the agreed proposed bill, and that the independents hand in their recommendation for a 1c differential. This was accordingly done by the independents, and they handed in a 1c differential which was substantially the same as subdivision c of section 317 of the Milk Laws of 1933 as subsequently enacted.

The Agricultural Committee thereafter reported out the Pitcher Bill with subdivision c of section 317 of the Laws of 1933 included. It will be observed that it was not the cost of advertising that the Legislature considered but it was the relation that the differential bore to the

whole plan of improving the condition of all of the farmers of the State, and likewise protecting the independent dealer, the independent producer and consumer. This one cent differential was the king-pin intended to hold the milk legislation in equilibrium and just balance.

It was submitted that, the big companies engaged, primarily, in *retail* house to house trade, were to receive a definite price for their milk, so delivered, and the independent dealers were permitted to retain their *wholesale* market for their unknown brands of milk on a competitive and reasonable basis.

It was also submitted that where the sales involved loose milk in 40 quart cans (where loose milk may still be sold in hotels and restaurants) no price differential was necessary for the product reached the consumer under no trade-name.

This section was adopted for the purpose of continuing during the emergency the custom of the one cent differential with the object of maintaining the *status quo* in the industry as it existed in normal times, for the benefit of all concerned. If this keystone provision of the bill were omitted, the entire milk legislation would have failed of its purpose. It was only after days of discussion, argument, examination of relevant facts and deliberation that the Legislature enacted subdivision c of section 317 of the Laws of 1923. It was not merely subsequently amended in that respect as claimed by the complainant. No minutes were taken at

this representative hearing, but the writer as well as W. H. Marcussen, who has submitted an affidavit on behalf of plaintiff, were members of the Committee.

As to the One Cent Differential of 1934

After the Pitcher Bill of 1934 was proposed, a joint hearing was held before the Senate and Assembly Committees of Agriculture on March 23rd, 1934. Senator Byrnes presiding, expressed the purpose of the hearing

> "that we may have a bill that will accommodate itself to the emergency and to the exigencies and to the end that every producer, every consumer and every dealer * * * * will have had full and fair play by the Legislature."

(Minutes of legislative hearing of 1934, p. 2, l. 21, et seq.). Throughout the hearing, various speakers pointed out to the Committees the importance and necessity of section 258q as it related to the entire milk law plan.

At the discussion before this Joint Legislative Committee, Mr. A. C. Pilger a producer, said:

> "In regard to this advertised brand business, we are very much interested. I believe that any farmer, if he knows his business is going to take an interest in the consumer and distributor as well as the producer. It is necessary to see the

whole picture to form a concrete conclusion'' (p. 178, lines 14-19 of the Legislative hearing, 1934).

It is obvious therefore that this one cent price differential is a coordinate part of a broad scheme of relieving the producer, of maintaining a fair price structure for the consumer and of preserving the independent dealer during the emergency.

2. The Provision for the One Cent Differential is not Arbitrary, Discriminatory, nor Unreasonable.

Plaintiff complains that only a few large companies have been singled out and the law is therefore unreasonable.

This contention cannot be sustained since the law does not single out any company but includes all that come within the definition of the statute. What is a well advertised brand is always a question of fact to be determined by the Division of Milk Control. The law exempts no one. Any dealer who attains a similar position will be similarly classified. The law does not single out a few, but all who as a matter of fact are found to be well advertised.

3. There is a Reasonable Basis for the Classification.

There are apparent and obvious differences between the dealers in advertised brands of milk and those dealing in unadvertised brands of milk.

There is a difference and distinction of character, structure, methods of doing business, outlook, power and influence between the complainant and the dealers not having a well advertised trade name or independents as they are commonly called. It is not alone the advertising that distinguishes the complainant from the independents, but the difference is reflected in the advertising itself. The advertising is an apparent effect of the contrariety. The advertising designates rather than describes the class. The independent dealer is limited and confined to a local area; the complainant operates on a national and even international scale.

The complainant sells its products under registered trade names; the independents do not. When the complainant advertises in one area the advertising may also bear fruit in other areas of its operations. The complainant and the other well advertised firms are component parts of a group of companies owned by a common parent. These component parts lend flexibility and adaptability to the operations. While for instance the complainant is limited to well advertised brands its affiliate, Reid's Union Dairy, can and does properly operate as an unadvertised dealer in the milk business and as an advertised dealer in the ice cream business. The Sheffield Farms Co. has its sister company, the Muller Dairies and it operates as an unadvertised milk dealer. The Dairyman's League has its Sacks Dairy Co., Delancey Dairy Co., Beakes Dairy Co. and others operating as unadvertised dealers in milk.

The independent dealer generally sells only fluid milk and cream. The complainant not only sells fluid milk and cream but has a chain of grocery stores selling groceries and other food products. The complainant and its parent company also deal in cheese, condensed and evaporated milk, sour cream, milk sugar, powdered and malted milk, washing powder, poultry feed, caseine and other milk and related products. The complainant has a long range planning outlook. It often enters a field of endeavor at a loss for the purpose of eliminating competition or enticing business. It controls the price structure of a market by shipping the surplus of one market to demoralize or control the price structure of another. The power of the complainant and the other dealers of the well advertised brands is enormous in wealth and influence. The Dairymen's League has received millions of dollars in loans from the Federal Government. The financial structure of the complainant is different. The complainant's stocks are held by the parent company whose stocks are sold on the exchange. The complainant is advertised by newspaper, magazine, propaganda editorial, billboard, electric sign, school (by means of screens the schools show how milk is handled "by courtesy of" either complainant or Sheffield's Farms). In school books (showing how milk is transported, trucks are shown bearing names of the complainant) and on radio from morning till late at night the products of the complainant are exalted and extolled. All these characteristics and distinctions do not attach to the independent dealers.

There is also an enormous difference in size as well as in structure and method of doing business between the complainant and the independent dealers. The complainant states the well advertised group take the outlet of 42,000 milk producers while the hundreds of independent dealers take the outlet of about 50,000 milk producers.

4. The Public Regards the Advertised Brands as Being Impressed with a Special Characteristic.

By reason of these well known facts the product of the well advertised dealers have come to be regarded by the general public as being impressed with a characteristic of different quality, and to be regarded as worth more money than the unadvertised brands. The well advertised brands therefore enjoy a preference when placed side by side with unknown brands.

The legislature recognized the fact that in order to continue the sale of the products of 50,000 independent producers a continuance of the competitive price would be necessary to meet the preference for the advertised brands of milk. Where the product reached the consumer under no well advertised brand such as loose milk, no differential was established.

With respect to City Market, there are really two industries, the retail and the wholesale store industry. The complainant caters principally to house to house trade while nearly all the independents engage only in the store business. The well advertised brands run according to

city records about 4,500 retail wagons and their agents keep contact with the city populace and each agent is a company booster. While the hundreds of independents operate only about 300.

The retail trade is more than 90 per cent in the hands of the well advertised brands. The differential between the house to house trade and the unadvertised brands in the stores was prior to the enactment of the milk laws at least 2 cents per quart. For that reason the legislature obviously found no reason for disturbing the price differential in house to house trade between well advertised brands and unadvertised brands. The Legislature continued the *status quo*. The legislature found that these differences required classification.

> "We must know why the discrimination is desired, to what end it is directed and the relation between end and means. If the motive is vindictiveness, ensuing in mere oppression, the result may be one thing. If the motive and the end attained are the advancement of the public good, the result may be quite another, unless preference and repression go so far as to outrun the bounds of reason."
>
> *Liggett Co.* vs. *Lee,* 288 U. S. at p. 585.

> "Slender though the difference of organization is, it is real enough to rescue classification from the reproach of an arbitrary preference."
>
> *Liggett Co.* vs. *Lee, supra,* at p. 585.

> "There is a presumption that the legislature did not classify * * * without study of the relevant data or without an informed and considered judgment. Its findings are not subject to annulment by a court unless facts within the range of judicial notice point to them as wrong."
>
> *Liggett Co.* vs. *Lee, supra,* at p. 586.

The Legislature has wide discretionary powers to classify those engaged in the same industry.

> " * * the equal protection clause does not take from a state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary * * *."
>
> *Whitney* vs. *California,* 274 U. S. 357, 369.

5. The One Cent Differential is an Integral Part of the Entire Law and Carries Out the Purposes Thereof.

This provision of the statute is a coordinate part of the broad scheme of the entire law and is inextricably connected with purposes and objects for which it was enacted.

Prior to the enactment of the ordinance prohibiting the sale of loose milk in the City of

New York, the products of the independent producer were sold primarily through the stores. The well known brands of milk were sold primarily in house to house trade. With the advent of bottled milk in the stores it became impossible to sell an unknown brand of milk for the same price as that charged for the well known. Manifestly a price balance was and is necessary. Otherwise the product of the independent producer can find no market, except that of manufacturing which realizes a very low price. It was clearly pointed out to the Committee that in order to preserve the market of the independent producers, it would be necessary to maintain a price differential between the known and unknown brands of milk.

The Legislature recognized the fact that in order to continue the sale of the products of fifty thousand independent producers, a competitive price would be necessary in order to meet the preference for advertised brands of milk.

The price differential weighed in favor of the unadvertised brand so as to balance and equalize the possible sales demand. The limitation of the price differential was for the purpose of avoiding unfair trade practices so that the unknown brand could not create a price war.

The Legislature also sought to avoid unfair trade practices, and sought to avoid price wars. It therefore set a limit of 1c for this competitive price differential. This limit is not arbitrary. The differential may be less than 1c, but it cannot be more. The Legislature determined that the producers were to receive a definite

price for their milk, the big companies engaged in *retail* house to house trade were to receive a definite price for their milk, and the independent distributors were permitted to retain their *wholesale* market for their unknown brands of milk on a competitive and reasonable basis, and thus maintain a market for the independent producers and dealers. These considerations bear a reasonable relation to the purposes of the statute, which seeks to afford relief to all engaged in the industry and permits no new advantages to any.

Such classification is proper if any reasonable state of facts can be conceived to sustain it. *State Board of Tax Commissioners* vs. *Jackson*, 283 U. S. 527.

> "The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction * * * or if any state of facts reasonably can be conceived to sustain it."

In *Rast* vs. *Van Deman & Lewis*, 240 U. S. 342, a Florida statute placed a different rate of tax on stores issuing profit sharing coupons than on other stores. The lower Court held that the giving of such coupons was a legitimate means of advertising and held the statute unconstitutional. The Supreme Court reversed the Court below and sustained the law. The Court said:

> "The difference between a business where coupons are used, even regarding their use as a means of advertising and a business where they are not used is pronounced. * * * It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed" (p. 357).

The Court should sustain the classification when there is a difference between the classes, but the difference need not be great. The Court held further in the above case:

> "Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great."

In determining whether or not there is any relation between the classification and the purposes of the enactment, the Court should consider the state of facts existing at the time the law was passed, the facts which the Legislature considered, and the purpose of the legislation. *Royster Guano Co.* vs. *Virginia, supra; Liggett* vs. *Lee, supra.*

The Minutes of the Legislative meetings are submitted herewith, and some of the relevant excerpts therefrom are annexed hereto. It clearly appears therefrom that the Legislature con-

sidered the various arguments for and against the price differential. It also appears therefrom that such enactment was a necessary part of the act, and that without it, producers, distributors, and consumers would suffer. The public welfare during the emergency required it. It also appears therefrom that the pertinent subdivision herein attacked, was a necessary means of accomplishing the purposes of the entire law. The minutes also show that the legislature properly exercised its discretion.

This subdivision represents in the law that which had been already existing as a common trade practice. The classification was made in accordance with the conditions prevailing. The law does not change the basis of the business as hitherto practiced. The Legislature has classified according to general considerations, and with a distinct regard to customs, usages, policy and prevailing conditions.

It was the duty of the Legislature to consider the propriety of the classification from the practical necessities of the situation. This has been held a proper basis of classification.

In *Continental Baking Co.* vs. *Woodring*, 286 U. S. 352, the State statute regulated motor vehicles and taxed them on the mileage basis. The Statute did not pertain to motor vehicles which had their base in cities and operated within a radius of twenty-five miles of such city, or to the transportation of farm products to the market by the owner of the products. The plaintiff was a baking company making

deliveries in its own trucks. The Court held the law was valid since the distinctions made in the statute were made necessary for practical reasons and for convenience. The Court said:

> "The practical convenience of such a classification is not to be disregarded in the interest of a purely theoretical or scientific uniformity" (p. 371).
>
> "The Court (below) properly excluded from consideration mere hypothetical and fanciful illustrations of possible discriminations which had no basis in the actual experience to which the statute was addressed. The court found a practical difference * * *" (pp. 372, 373).

In *Standard Oil Company* vs. *Tennessee,* 217 U. S. 413, the anti-trust statute of Tennessee provided for different modes of enforcement as against corporations and individuals and for this reason was attacked as invalid.

The statute was sustained and the Court stated.

> "The foregoing argument is one * * * to construe the Fourteenth Amendment as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment."

The classification made in the present statute is one that merely recognizes an existing prac-

tical and necessary business practice, and such classification is proper.

In *Miller* vs. *Wilson*, 236 U. S. 373, a statute limiting the hours of labor of women but excepting certain industries was attacked as invalid, for this reason, but was upheld. The Court said:

> "The legislature is not debarred from classifying according to general considerations and with regard to prevailing conditions; otherwise there would be no legislative power to classify. For it is always possible by analysis to discover inequalities as to the same persons or things embraced within any specified class • • •" (p. 382).

The Legislature recognized the fact that in order to aid the producers, it was necessary to protect the market of the producer. It also recognized the fact that the existence of the market was dependent upon a competitive price. The protection of the market of fifty percent of the producers goes to the very basis of the purposes of the law.

Another purpose of the law was to prevent unfair trade practices consisting of constant, extensive price cutting. The Legislature therefore, provided for the limitation of price cutting. While it recognized the fact that unadvertised brands would have to continue to undersell the advertised brands, it set a limit of 1c in the stores. In other words, they might

very well undersell to the limit of one cent, but the advantage given was to provide a favorable balance of price so that the two articles would *have an equal prospect of sale.*

The classification in view of the emergency was fair and reasonable. The law here enacted was passed in aid of the farmer and for the public welfare during the period of an emergency, and the emergency gave rise to the necessity for the classification.

In *Home Building and Loan Assoc.* vs. *Blaisdell,* cited in the United States Supreme Court on January 8th, 1934, the Court said:

> "While emergency does not create power, emergency may furnish the occasion for the exercise of power. Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed. *Wilson* vs. *New,* 243 U. S. 322."
>
> "The constitutional question presented in the light of the emergency is whether the power possessed embraces the particular exercise of it in response to a particular condition."
>
> "It is manifest from the review of our decisions, that there has been a growing appreciation of public needs and of the necessity of finding grounds for a rational compromise between independ-

> ent rights and public welfare * * * * and the question is * * * * the use of reasonable means to safeguard the economic structure upon which the good of all depends."
>
> "This power which in its ramification is known as the police power is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

The Legislature found that an emergency existed in the dairy industry and sought means of protecting the farmer and the general public. It found necessarily that to accomplish this purpose, a classification of the dealers was necessary.

In *Rast* vs. *Van Deman & Lewis,* 240 U. S. 342, the Court held:

> "It makes no difference that the facts may be disputed or their effect opposed by argument or opinions of serious strength. It is not the competency of the courts to arbitrate in such contrarity."

In *Nebbia* vs. *New York,* decided by United States Supreme Court, March 5, 1934, the Court held further:

> "It results that a regulation valid for one sort of business, or in a given cir-

> cumstance may be invalid for another sort or for the same business under other circumstances because the reasonableness of each regulation depends upon the revelant facts."
>
> "Laws passed to secure fair trade practices have been found consistent with due process."

In *Rast* vs. *Van Deman & Lewis, supra,* the Court further held:

> "It is the duty and function of the legislature to discover and correct evils, and by evils we do not mean some definite injury, but obstacles to greater public welfare. And we repeat, 'it may make discriminations if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary'."

It has been held that the method and the nature of doing business is a sufficient basis for a classification.

In *Liggett* vs. *Lee,* 288 U. S. 517, citing with approval *State Board of Tax Commissioners* vs. *Jackson,* 283 U. S. 527, the Court said:

> "It was there held that whatever may be said of individual similarities and differences between chain store operation and the conduct of a single shop or department store, the former employ distinguishable methods of conducting bus-

> iness, and the legislature may make the difference in method and character of business the basis of classification for taxation."

In *State Board of Tax Commissioners* vs. *Jackson, supra,* the statute attacked, raised the question similar to the one raised in this case. The statute imposed a tax upon chain stores at a higher rate than upon individual stores. Proof was presented that there were "many points of difference" between chain stores and independently owned units. A similar situation exists in the instant case. The Supreme Court held:

> "The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction * * * or if any state of facts reasonably can be conceived to sustain it."
>
> "If the selection or classification is neither capricious nor arbitrary and rests upon some reasonable consideration of difference or policy there is no denial of the equal protection of the law."
>
> "Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great."

In *Nebbia* vs. *New York, supra,* the Court held, in speaking of dealers and storekeepers

who sold the same product, that the Milk Control Law was not on its face arbitrary or unreasonable

> "for there are obvious distinctions between the two classes of merchants which may well justify a difference of treatment. * * *"

In *American Sugar Refining Co.* vs. *Louisiana* 179, U. S. 89, the statute attacked levied a tax on all persons refining sugar and molasses, but exempting therefrom planters and farmers grinding and refining their own molasses and sugar. The Court held:

> "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination if founded upon a reasonable distinction in principle is valid."

In the same case, the Court cited with approval, and stated:

> "In *Pacific Express Co.* vs. *Seibert,* 142 U. S. 339, a state statute defining an express company to be such as carried on the business of transportation under contracts for hire with railroad and steam boat companies, did not invidiously discriminate against the express companies defined by it, by exempting other companies carrying express matters in vehicles of their own."

The foregoing authorities clearly indicate that

the Legislature in its discretion, has power to make such classification in industries as effectuate the purpose of their enactment. Particularly, this power may be exercised during an emergency.

The emergency in the dairy industry gave rise to the necessity for the enactment of the entire law. It likewise gave rise to the necessity of the classification in order that the purposes of the entire law may be effectuated.

CONCLUSION.

The one cent price differential bears a direct relation to the price fixing structure. It is inextricably connected with the objects and purposes of the law, and is a coordinate part of the whole plan. The legislature informed itself of the custom and usage of the city business. It knew that the unadvertised brands were selling and could sell only at one cent a quart less than the well advertised brands. It continued a custom that preserves the independent dealer so that the independent milk producer would not have the outlet for his milk destroyed. The statute was designed for the relief of all the farmers. Without the one cent differential no relief would have been afforded the independent producer. It also took into consideration the interests of the city consumer and guarded the general welfare of the public. The omission of this provision would have thrown all the business into the hands of the well advertised brands and monopoly would have resulted. The provision attacked herein was de-

signed to preserve the independent dealer, the 50,000 independent producers and to promote the public health and general welfare. The legislature acted from lawful motives and its act should not be annulled as arbitrary (see minutes of joint hearings and the excerpts of the minutes hereto annexed).

It is respectfully submitted that the decree of the United States District Court for the Southern District of New York should be affirmed.

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EZRA B. KOTCHER,
Of Counsel.

ADDENDA

EXHIBIT A

JOINT HEARING
before the
Senate Committee on Agriculture
and the
Assembly Committee on Agriculture

Hearing on Milk Control Legislature

March 23, 1934

Statement by Assemblyman Maurice A. Fitzgerald
(Page 47 of Hearing)

Assemblyman Maurice A. Fitzgerald, of the Fifth Queens County District is desirous of being heard at this time. We will be pleased to hear from Assemblyman Fitzgerald.

ASSEMBLYMAN FITZGERALD: Mr. Chairman, and Gentlemen of the Committees, the Pitcher-Bartholomew Bill by leaving out section 317-C of the Laws of 1933 will in my opinion, increase the cost of milk distributed by independent dealers and sold through retail stores to consumers in the City of New York by one cent per quart. There are approximately 1,600,000 quarts of such milk sold daily through these stores in New York City. If the Pitcher-Bartholomew Bill is adopted in its present form the increase in the cost of milk to the consumer in New York City will be $16,000 per day, or almost $6,000,000 per year.

Since the well-off citizens usually have their milk delivered to their homes it will be readily seen that in the main the milk sold through the retail store is consumed by the poor. While there might be some slight justification of such a mulcting of the consumers of New York City if this huge sum was paid to the farmers, such is not the case. This extra money does not go to the farmer. It must be paid to the independent dealer distributor who is already paying milk control board prices to the farmer, and this in spite of the fact that the independent dealer is not asking for this increase. If the Pitcher-Bartholomew bill is to be adopted at all it should be amended by adding a provision such as that contained in the present law which authorizes the independent dealer to sell milk to the retail stores at a price one cent below the price fixed for advertised brands.

Thank you.

CHAIRMAN BYRNE: Thank you, Assemblyman Fitzgerald.

Statement by Mr. Stanley Piseck, President of the New York Milk Producers Federation
(Page 54 of Hearing)

• • • • • • • •

One nation-wide distributor has met all fixed expense. He has met his dividends. On top of that he could pay his officer $108,350 as a salary. Now, another nation-wide organization paid its president in 1929, our boom year, $109,332; in 1932, a depression year, that salary was raised

to $171,099. Another officer in that organization has over $100,000 as a salary. Any one of these three men has received more than the 100,000 dairy men producing in the metropolitan area.

One of those men got more than the entire industry. That is something to look at.

We had that department, and I will say when these same practices were started in the middle west they were stopped by that department, and they as pioneers have given us price fixing and enforced it. Now we don't expect to come here and preach to you that this milk control board is unnecessary. It is very necessary, but on the other hand I hope that not only our commissioner, but the Council of Farms and Markets prick upon this. They have been stagnant. They have been motionless. They haven't prepared these men against these mergers.

Now these things we have got to contend with. It is possible with these nation-wide dairy organizations to demoralize any market.

Statement by Mr. Felix Piseck
(Page 77 of Hearing)

* * * * * * * *

MR. PISECK: It is necessary—there is a suggestion I would like to add to the bill—it is necessary for one cent differential on advertised and non-advertised brands of milk. If that isn't included it endangers the small independent dealer.

Statement by Mr. E. F. Cook
(Page 106 of Hearing)

• • • • • • • •

As I have said, on page 27, line 26, after "period" I would insert this, and this is taken from the old bill and I believe as a matter of justice to the independent distributors and producers you must insert it in this bill: "It shall not be unlawful for any milk dealer who has been continuously engaged for the past five years in the business of purchasing and handling milk, not having an advertised and well established trade name, in a city of more than one million inhabitants to sell to stores in such city at a price not more than one cent per quart under the minimum price fixed by the board for sales to stores in such a city; and the price to be charged by stores to consumers shall be fixed by the board accordingly.

That restores the advertised and unadvertised brands of milk.

• • • • • • • •

Statement by Mr. Hugh W. Taylor
(Page 121 of Hearing)

Mr. Hugh W. Taylor: Mr. Chairman and Members of the Legislative Committees, I wish to thank you for the courtesy and the honor of appearing before you.

May I say that the purpose of my talk has something to do, not so much with what is in the bill but with what is not within the bill, and

I refer to the question of the sale of unadvertised brands of milk in New York City.

May I say for your information and for the information of your committees that the very life blood of the independent dealers of New York City depends entirely upon the continuation of that provision in last year's bill.

And may I say further that the men whom I represent are the type of men who pay the very highest salaries to their drivers and other employees. They pay the very finest and highest returns to the producers and, incidentally too, may I say that we are all interested in the producer getting a fair and large return for his money and his work.

* * * * * * * *

I am trying to be as emphatic as I possibly can in order to drive these lessons home to you and to try and tell you that the continuation of the unadvertised brands proposition as carried out under the old law is absolutely necessary and that the independent milk dealers of New York City will be completely either wiped out of existence, if you don't continue it, or that your law will absolutely have no bearing whatever, * * *.

Statement by Mr. Woodhead
(Page 125 of Hearing)

* * * and if you will remember in that year we were opposed by the Dairymen's League, Sheffield, and all the high finance milk industry.

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Statement by Mr. William J. McKay
(Page 129 of Hearing)

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MR. MCKAY: There is a great deal of misunderstanding on this matter of advertised and unadvertised brands of milk in the City of New York.

I want to say first that it is the only place that I know of in the United States where they brand an equal grade of milk as an advertised and unadvertised brand, forcing the small dealer that may not be that fortunate as to have had a business large enough to advertise his milk, to sell his milk at a reduced price for which the mother of the children in purchasing that immediately says to herself, it is an inferior article.

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Statement by Mr. William Marcus
(Page 143 of Hearing)

* * * * * * * *

Now, in the recommendations I have noticed no comment mentioned of the law of last year, which is section 317, subdivision C, which should be taken out, and that is the advertised and unadvertised price for milk. In order to go into that, gentlemen, I must tell you a little bit of the history of our milk business.

We sell to stores and to stores only. Prior to June 1, 1933, we were selling loose milk to those stores and women of New York City who cannot afford their milk to be delivered to their

boudoirs came down with pails and took this milk home.

Then too the laws of the City, of the Health Department of the City of New York, abolished loose milk because in the mind of our Commissioner Wynne, at that time loose milk was a public hazard, and they put us into the bottled milk business. So we are in and have been in the bottled milk business since June 1, 1933, which is only about eight or nine months.

Now, during that time when we sold loose milk the poor consuming public in New York City has paid for this milk four cents per quart less than the bottled milk price. If loose milk was sold in New York City for ten cents a quart the bottled milk delivered at home was 14 cents a quart. When the bottled milk came out at first we didn't get a chance to sell it. In order to introduce it to the public we gave it away and the checks that we paid to producers will easily verify that.

Then the Control Board was created and they fixed a price of bottled milk to stores and then to consumers, and you gentlemen at that time saw fit to put in that clause that the unadvertised brands should be one cent less than the advertised. Now let's follow that out. If a woman is good enough to come down every morning and pay three cents deposit on a bottle of milk, I think in my opinion she should pay two cents less. I think we have plenty of poor people in New York City who need that milk and will probably go without it if you increase the price.

Now, let's see what would happen if you look

that away from us. From experience that I have known in New York City I will quote now what happened with the Dairymen's League who extensively advertised a brand of milk for a period of years in New York City and they were selling to stores only and at a time when this Control Board sent out its first orders they found after spending millions of dollars for advertising purposes that they could not sell Dairylea milk and they substituted with an unadvertised brand in Manhattan and the Bronx, so called Biggs Dairy milk, for a cent less, and in Brooklyn Delancey milk, which shows that they haven't had a chance, or there wasn't time enough to advertise that milk to sell it to the public in New York City.

What else is going to happen? You are going to put on us the same price. The first thing we will show you that we will try to retain our business and thereby you will make criminals out of us because we will have to undersell to the storekeeper in order to push our milk. You know that the large companies in New York City, and I know some of your gentlemen who come from New York, when you talk milk all you hear is Sheffield and Borden's. The big companies spend thousands of dollars on the radio. I know I have got a little boy seven years old that listens to Uncle Don every night for a half hour, and he comes back and says to me: "Daddy, why don't they mention Municipal Farms Milk?" Because he thinks there is nothing else but Borden's. I can't afford to do that, and none of us can afford to do that, and I will tell you why we cannot afford it. • • •

Statement by Mr. Irwin Kotcher
(Page 167 of Hearing)

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Right in this man's district, this man sitting right here, 90 per cent of the milk being used is unadvertised. There is at present a 22 per cent reduction in the sale of milk in his district. I sell milk there. I have the record for it. And if we put in advertised, they can't buy it now, and we raise them another cent,—a good many more will have to stay without milk. Is that a policy to be followed right now? Is that what we are facing?

We are buying milk in New York State and we can sell it a cent cheaper. We have no hundred thousand dollars salaries. We have no inter-plant shipments that in the records show it cost about half a cent to ship from one plant. We are satisfied with what we have got and if we can handle it economically in these plants, all right. But that is nothing. They say we have no national concern with a view of what is happening in St. Louis and Mississippi and California. Our interest lies right here. We can make friends with our farmers upstate. I don't think I have any enemy upstate amongst the farmers, and I happen to be a distributor. I don't have to tell you what the distributor is to the farmer. That is human nature. But I don't believe I have an enemy. If there is one in the hall, let him say so, amongst the producers. And our company isn't doing any better then the reputable independent. We have paid 40 to 50 cents at least a hundred more than some others that sold advertised, and still

we didn't come up crying about it. We were losing money; we admit it; we had our nose on the grindstone, but are we led to infer that while we lost money the impression was cast here that others made money. If such is the case, then there should be no unadvertised milk. The farmer is paying for it, but let's look again at the record.

CHAIRMAN BYRNE: You favor the bill as it is, retaining that provision?

MR. KOTCHER: Yes, and strengthening it. We have some minor improvements, but make it as strong as possible; it is the best thing we could have had.

CHAIRMAN BYRNE: The cent differential, I mean.

MR. KOTCHER: Yes. Now, there has been an impression cast that the farmer is paying our unadvertised brand. I was on committees a half a dozen times before the Control Board with different people from the larger companies. We claimed we lost money and they claimed they lost money. The Sheffield Company, I have their brief home by their main man who handles that; the Borden Company claimed they lost money; the Dairymen's League was along with us and we were there, and we all proportionately lost money but we didn't lose any more than they did proportionately. We were all in a box. But let's not infer that we are selling that milk, unadvertised milk, at the expense of the farmer. We are ready to meet him. Put the price out regardless of what it is that is fair. We will pay it. Let all pay it, big or small, independent or cooperative, and we can

ride along and live. All that we ask is a square deal for the independent distributor. We are being legislated out of business. Last year we had the same thing. The Big Three opposed us. We had it out. We found it was equitable. It was enacted in the law. It isn't our fault.

CHAIRMAN BYRNE: And you want it to stay there?

MR. KOTCHER: We want it to stay there, and we feel we are absolutely justified in having it stay there.

There are a lot of other things I could go into but the main thing is, we are just, it is coming to us, and not for one year, as my colleague here said a moment ago. If we can go ahead and pay the price and continue paying the price, satisfying our farmers, and they are satisfied, and we can economically deliver milk in New York City at a cent cheaper, the poorest of the poor only get that milk, why shouldn't they get it and why shouldn't milk be sold to protect two or three in New York City? No, we are not philanthropists. But we can do it. We are not out to become millionaires, but we can continue in business. I have been born in it; my father was in it, and there are men in the room that were born in it and can continue in it, and we have always continued, paid our bills, and we want to pay our bills. All we ask is for a square deal.

CHAIRMAN BYRNE: And a continuance of last year's provision?

MR. KOTCHER: Yes, section—I have it here, but it has been read into the record, continued in the bill.

CHAIRMAN BYRNE: We know it. Thank you very much.

Statement by Mr. A. C. Pilger
(Page 178 of Hearing)

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In regard to this advertised brand business, we are very much interested. I believe that any farmer, if he knows his business, is going to take an interest in the consumer and the distributor as well as the producer. It is necessary to see the whole picture to form a concrete conclusion.

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Statement by Mr. Paul Balsam
(Page 196 of Hearing)

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I will at this time first refer to the statement made by independent dealers, that they wish to sell their product, which is an unadvertised product, in the City of New York at a price which is one cent below that of advertised products, and in support of that I wish to say that it is not the fact that we are charitable that compels us to do this. I will say it is because of the fact that if we are forced by the Legislature or by any Control Board to increase the price of our product so that it will net us a return which is far in excess of what the average investment should receive, that it will tend to increase the cost of our distribution in excess of one cent.

So you will have an instance of where a certain group of people willing to sell merchandise at a certain price in comparison with another group who, by reason of advertising expense and because of their capital structure must receive a larger price. You have the instance where we will be forced to increase our expense in distribution by this way.

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Statement by Mr. David Hoffer
(Page 217 of Hearing)

MR. DAVID HOFFER of New York City: Gentlemen, it looks that I represent that forgotten man, the independent grocer.

CHAIRMAN BYRNE: Good.

MR. HOFFER: That fellow wasn't represented tonight.

CHAIRMAN BYRNE: I haven't heard of him.

MR. HOFFER: I come from New York, and I think I am going to make it as brief as possible. We come in here, and where in New York we are worried on account of the bill as introduced now having gotten into what we had last year, that we have the advertised and unadvertised brands, and in New York we are worried.

CHAIRMAN BYRNE: You want it in, do you?

MR. HOFFER: We want it in because 40 or 45 per cent of our business in New York is milk and milk products, and we have today particularly with the relief food tickets, and we haven't got the unadvertised at one cent cheaper, and

therefore we are sure to lose 50 per cent of our business, and we are particularly worried.

I have been sent by my organization to see and do my utmost, if I can. We have to have in New York, particularly the independent storekeepers dealing with the poorer customer, the woman that comes down to the store to buy a bottle of milk just because she is saving two cents. If we were to be put on the level of no difference which milk, we are sure to lose 50 per cent of our business and probably 50 per cent of our business men in New York, because it is between 45 and 50 per cent of their business that is dairy. We would like to endorse in regard to this committee, to endorse the recommendation of Mr. Cooke that I heard today, to increase the membership of the Milk Control Board, but to increase it so that also these 75 to 85 thousand retail grocers in the State of New York have also a representative.

CHAIRMAN BYRNE: Yes.

MR. HOFFER: We have always been the forgotten men wherever it came. We have given full 100 per cent cooperation and in New York City we have given 100 per cent cooperation to the Milk Control Board. We are always giving our cooperation. I see no reason, or it looks to me as unjust when they forgot the retail grocer in New York City with 30 or 35 thousand dealers. They are selling all that. The farmer is claiming and all that the independent dealer is claiming, we are selling direct to the woman the milk, and at all times we are forgotten. New York is for, and I can say 100 per cent for, having two prices on milk, one cent

cheaper for the lady that has a food ticket, or if she hasn't got a food ticket she comes down from upstairs and is willing to save two cents on a bottle of milk.

CHAIRMAN BYRNE: You really like the Control Board idea, do you?

MR. HOFFER: Yes, sir.

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Statement by Mr. Bert Thompson
(Page 221 of Hearing)

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MR. THOMPSON: We had a good market until the damned cursed Dairymen's League undersold us in New York and took it from me.

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SUPREME COURT OF THE UNITED STATES.

No. 296.—October Term, 1934.

Borden's Farm Products Company, Inc., Appellant, *vs.* Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, et al., etc.	Appeal from the District Court of the United States for the Southern District of New York.

[December 3, 1934.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The New York Milk Control Law of April 10, 1933,[1] in authorizing the Milk Control Board to fix minimum prices for sales of fluid milk in bottles by milk dealers to stores in a city of more than one million inhabitants, established a differential of one cent a quart in favor of dealers not having a "well advertised trade name".[2] The Milk Control Board determined that the phrase "well advertised trade name" referred to four dealers, of which the complainant, Borden's Farm Products Company, Inc., is one.[3] The authority of the Board terminated on March 31, 1934. An amended act was passed to take effect April 1, 1934,[4] which placed the milk control in a division of the Department of Agriculture and Markets. This Act continues the differential of one cent a quart in sales of fluid milk in bottles by dealers to stores, in favor of dealers not having a well advertised trade name, and provides that the lower price shall also apply on sales from stores to consumers.[5]

[1] Laws of 1933 (N. Y.), chap. 158; see Nebbia v. New York, 291 N. Y. 502.

[2] *Id.*, sec. 317 (c).

[3] Order of May 5, 1933. The four dealers thus designated were: "'Borden's Farm Products Co., Inc., 'Borden'; Sheffield Farms Co., Inc., 'Sealect'; Dairymen's League Co., 'Dairylea'; and M. H. Renken Dairy Co., 'Renken' ".

[4] Laws of 1934 (N. Y.), chap. 126.

[5] *Id.*, Sec. 258-q. The provision is as follows: "It shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-three has been engaged continuously in the business of purchasing and handling milk

Complaining that the fixing of this differential, in respect to sales of the same commodity, was an invasion of rights guaranteed by the Fourteenth Amendment, plaintiff brought this suit to enjoin enforcement. An interlocutory injunction was sought and a court of three judges was convened. Defendants moved to dismiss the complaint upon the grounds that it failed to state a cause of action in equity and that the provision of the statute was constitutional. Affidavits were presented on both sides and the case was heard on the motion for injunction and the motion to dismiss. In view of the cumulative penalties provided, the court had no doubt of its jurisdiction to pass upon the question of constitutionality. Dealing with the case in that aspect, the court held that the complaint did not state a cause of suit and dismissed it for that reason. The court regarded the application for an interlocutory injunction as necessarily falling with the complaint and hence made no findings of fact. 7 F. Supp. 352, 354. The plaintiff appeals.

We turn to the allegations of the complaint. Plaintiff sets forth the full text of the acts of 1933 and 1934 and of the applicable orders. By the order of the Commissioner of Agriculture and Markets the minimum prices for the sale of fluid milk in bottles by dealers to consumers and to stores, and by stores to consumers, are fixed for the city of New York. The order determining the four dealers who have a "well advertised trade name" is continued in effect. Plaintiff alleges that for many years it has been continuously engaged in purchasing and selling milk in bottles in the city of New York and has built up a large business under its trade name "Borden's" for sales both to consumers and to the stores described in the statute;[6] that it operates nine retail stores in the city at which it has an extensive business in the sale of bottled milk to consumers under its trade name; that it has obtained from the Board of Health of the city all the necessary

not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city".

[6]The act of 1934, like the preceding act, defines "store" as meaning "a grocery store, hotel, restaurant, soda fountain, dairy products store and similar mercantile establishment". Sec. 253.

licenses and permits and has observed all the regulations of the Sanitary Code; that it has expended large sums in advertising its trade name and has thus created a valuable good will. Plaintiff alleges that it is in direct and active competition with numerous individuals, corporations and associations which are selling bottled milk to stores in the city but are not within the official determination of those having a "well advertised trade name"; that these competitors are permitted to sell to stores bottled milk at a price one cent per quart below the minimum price at which plaintiff is permitted to sell its bottled milk to stores under its trade name; and that stores are permitted to sell to consumers the bottled milk of these competitors with the same differential as compared with the minimum price at which plaintiff's milk may be sold by stores, and thus plaintiff is deprived of a large part of the market for its milk and the value of its property and good will are seriously impaired. Plaintiff states that the loss in trade it thus suffers amounts to not less than 25,000 quarts of bottled milk daily.

Plaintiff alleges that the maintenance of this differential, with the consequent privilege to its competitors and restraint upon itself, is "arbitrary, oppressive and discriminatory" and has "no relation to the protection of the public health or the public welfare or to any of the objects or purposes" for which the statute was enacted, and upon this ground plaintiff charge that the statutory provision violates the due process and equal protection clauses of the Fourteenth Amendment. Inability to obtain a license, unless plaintiff agrees in writing to comply with the statute and orders, and the prohibitive character of the penalties prescribed, are assigned as affording the basis of equitable jurisdiction.

We have frequently said, especially in confiscation cases, that a mere general allegation of repugnance to the Fourteenth Amendment is not enough to state a cause of action to restrain the enforcement of a statute or administrative order. See *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 447; *Public Service Commission* v. *Great Northern Utilities Co.*, 289 U. S. 130, 136, 137; *Hegeman Farms Corporation* v. *Baldwin*, decided November 5, 1934. But in determining the sufficiency of the allegations of the complaint we cannot fail to take note of the nature and effect of the legislative action which is assailed. Both nature and effect are apparent. We have here a novel, if not a unique, provision. The legislature does not purport to exercise an authority merely to fix prices, or mini-

mum prices, or to make different prices for different grades of milk, but attempts to establish for the respective dealers different minimum prices for the same grade of milk, bought and sold at the same time and place and under precisely the same conditions aside from the use of a well advertised trade name. There is no uncertainty as to the effect of the discrimination. As the court below said, the statute seeks to take away from dealers, who have well advertised trade names, "economic advantages which were not only theretofore lawful, but which have generally been commended and fostered". It strikes at the advantage acquired by dealers through the reputation of their brands and the consequent disposition of the public to buy them. In view of the peculiar nature and effect of this provision, and of the novel and important constitutional question that it presents, we think that the complaint should not have been dismissed for insufficiency upon its face and that the plaintiff is entitled to have the case heard and decided with appropriate findings by the trial court, unless it satisfactorily appears, upon facts of common knowledge or otherwise plainly subject to judicial notice. that the provision should be sustained as resting upon a rational basis consistent with constitutional right. Accordingly, we pass to the consideration of the various grounds that are suggested as adequate support for the legislative action.

In this inquiry, we again observe the limited operation of the provision. It is restricted to the city of New York, and to sales of bottled milk to and by stores. It does not apply to retail delivery direct to consumers and not through stores. It relates solely to minimum prices. It is not addressed to any practice in the industry, or trade in relation to production, handling or selling, apart from the trade name employed. As to all such matters, a dealer with a well advertised trade name is subject to the same strict requirements as are all other dealers. The price to the producer, the farmer, is not affected by the differential. He receives the same price for his milk whether it is sold by dealers with well advertised trade names or otherwise. We have had occasion to note that "Save the conduct of railroads, no business has been so thoroughly regimented and regulated by the State of New York as the milk industry". For many years, it has been "progressively subjected to a larger measure of control". *Nebbia* v. *New York, supra,* pp. 521, 522. This control has been in the interest of sanitary precautions and proper methods of production and trade. But because of the serious condition of the industry by reason of decline in prices

and demoralizing practices, as reported by a legislative committee after an elaborate examination, and upon the committee's recommendations, the legislature has now proceeded to price control. The legislative committee did not, however, recommend the fixing of the differential here in question, and hence did not state grounds in support of such a discrimination.[7] But in considering possible grounds, we are aided by the suggestions which the Attorney General of the State and the counsel for the Department of Agriculture and Markets, with their special experience, have been able to bring forward.

The ground chiefly urged is that the provision is intended as a precaution against monopoly. We turn to the expressed criterion of the statute. That criterion does not refer to restraint of trade in any of its connotations, or to any coercive action or unfair practice, or to any combination or concert. The provision for the differential is silent as to the use of any monopolizing methods or as to any monopolistic achievement. While dealers having well advertised trade names are grouped for the purpose of the differential, the statute is directed not at concerted action, but at the individual members of the group which are not shown to be, or, for the application of the differential, need not be, in any sort of combination or acting otherwise than in lawful competition with each other as well as with other dealers. The differential hits each dealer having a well advertised trade name regardless of the extent of that dealer's trade. That may be large or small. The court below said in its opinion that the four distributors determined by the department to have well advertised trade names sell about 35 per cent. of the bottled milk that is sold to stores in the city of New York and this is also stated in appellant's brief. That appears to be the amount of the described trade of the entire group, which are united only by the common characteristic that each member has a well advertised trade name. How much of the trade each of the four distributors may have, does not appear.[8] So far as the

[7]It appears that in the case of both the acts of 1933 and 1934, the provision in question was added in the course of legislative consideration of proposed measures and at the instance of dealers described as independents. 7 F. Supp., p. 353.

[8]Thus it does not appear how much of the "store" trade in bottled milk is that of the Borden Company or of the Sheffield Company or of the Dairymen's League Company or of the Renken Dairy Company, the four distributors found to have well advertised trade names.

criterion of the statute is concerned, that makes no difference. If the statutory provision is sustained as to Borden's, on the simple showing of a well advertised trade name, without more, it must also be sustained as to every other dealer with a well advertised trade name—those now on the list and those which the state authority may hereafter place there—no matter how small a part of the trade the dealer may have, or how independent of any connection with anyone else, or how free from any improper trade practice or lacking in monopolistic opportunity, such a dealer may be.

The suggestion has been made that the provision for the differential may find support in a supposed policy to increase the sales of milk,—that more milk may be sold than if the price were uniformly maintained. This suggestion does not appear to be sponsored by the Attorney General and the counsel for the Department of Agriculture and Markets. The answer is made that whatever opportunity there may be for increased sales lies in the lower price and not in the differential. If it be assumed that the lower price is a reasonable minimum and that it favors sales, the maintenance of the differential prevents the plaintiff and others in like case from resort to it.

Putting aside fanciful considerations, the argument at the bar has presented the case in its essential features. It is shown that the legislature was inspired by the fear that in a competitive market, under strict regulation and with a scheme of minimum prices, dealers without well advertised brands, the so-called independent dealers, would be at a disadvantage. The aim was not at advertising but at its natural result. "Well advertised" means well known. In setting up the differential, the legislature did not deal with monopoly in the ordinary sense of the term, but with an aggregate of economic advantages, lawfully and severally acquired, and possessed in varying degrees by the separate concerns having well known brands. The legislature put all these in one class and placed it under a handicap. For this discrimination, a special justification is urged. Respondents' counsel contend that the fixing of the differential was an effort to continue a condition which had obtained before the Milk Control law was enacted; that, previously, milk of the independent dealers had sold at lower prices than the milk of the well known brands; that in establishing price control, the legislature sought to preserve opportunities in compe-

tition which in actual practice the independent dealers had thus enjoyed and to prevent their trade from being destroyed by the operation of a scheme of uniform prices. The argument is that the legislature was confronted with a "practical situation"; that "the independents were to be deprived of their buying advantage by compelling all dealers to buy from producers at prices fixed according to utilization of the milk"; that this regulation involved "a stern readjustment of former competitive conditions", and the question was whether the independents should also be deprived of their selling advantage. The point is also made that the Milk Control law purports to be an emergency measure and that the legislature was entitled to protect existing opportunities of the independent dealers so that, if the emergency ceased and price control were abandoned, there could be a return to competitive conditions without such an elimination of dealers as might be caused by a temporary period of compulsory minimum prices on a uniform scale.

The factual basis of this contention is disputed and there are no findings disclosing it. Appellant asserts that there was not at any time any customary or accepted difference in price between the milk sold by it under its trade name and the milk of its competitors who are now favored by the fixed differential. And reference is made to the disturbed state of the trade, preceding the enactment of the Milk Control law, and to the effect of the ban imposed by local ordinance upon the sale of "loose milk", which led to changes in methods of distribution and to price adjustments from time to time in order to meet competition.

For the present purpose, it is sufficient to say that these arguments are addressed to particular trade conditions in the city of New York, which largely lie outside the range of judicial notice. Counsel refer to the affidavits submitted on the motion for injunction. And we are asked to extract from various tables and statements in the reports of the legislative committee, which were not addressed to the fixing of the differential here in question, sufficient data upon which to predicate a judgment. But the case is not before us upon evidence, or upon determinations of fact based on evidence, as the complaint was dismissed solely in the view that it failed to state a cause of action and the motion for injunction accordingly fell without findings being made. As we have said, we may read the complaint in the light of facts of which we may take judicial notice, but if, so read, it may be regarded as sufficient, the decision

of this appeal should not turn on other facts which are the proper subjects of evidence and of determinations of fact by the trial court.[9]

Respondents invoke the presumption which attaches to the legislative action. But that is a presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78-80; *Hammond* v. *Schappi Bus Line*, 275 U. S. 164, 170-172; *O'Gorman & Young* v. *Hartford Insurance Co.*, 282 U. S. 251, 256-258. It is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault. Nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack. When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary. *Lindsley* v. *Natural Carbonic Gas Co., supra; Clarke* v. *Deckebach*, 274 U. S. 392, 397; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 283. The principle that the State has a broad discretion in classification, in the exercise of its power of regulation, is constantly recognized by this Court. Still, the statute may show on its face that the classification is arbitrary (*Smith* v. *Cahoon*, 283 U. S. 553, 567) or that may appear by facts admitted or proved. *Southern Railway Co.* v. *Greene*, 216 U. S. 400, 417; *Air-Way Corporation* v. *Day*, 266 U. S. 71, 85; *Concordia Insurance Co.* v. *Illinois*, 292 U. S. 535, 549. Or, after a full showing of facts, or opportunity to show them, it may be found that the burden of establishing that the classification is without rational basis has not been sustained. *Lindsley* v. *Natural Carbonic Gas Co., supra; Rast* v. *Van Deman & Lewis*, 240 U. S. 342; *Radice* v. *New York*, 264 U. S. 292; *Clarke* v. *Deckebach, supra; Ohio Oil Company* v. *Conway*, 281 U. S. 146; *Tax Commissioners* v. *Jackson*, 283 U. S. 527. But where the legislative action is suitably challenged,

[9]How hazardous it is to assume that particular trade facts are of common knowledge is shown by the various estimates of the number of "stores" at which milk is sold in the city of New York, these estimates apparently varying from 25,000 to 60,000.

and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings. With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support.

Respondents' counsel, referring to the difficulties of price regulation, say that "Apparently the fixing of prices by government discovered as many troubles as were loosed from Pandora's box". This complexity of problems, however, makes it the more imperative that the Court in discharging its duty, in sustaining governmental authority within its sphere and in enforcing individual rights, shall not proceed upon false assumptions.

As the court below said, no precedents come very close to the instant case. In *Rast* v. *Van Deman & Lewis Co., supra,* the facts were fully disclosed (pp. 345-347), and it was held that the use of profit-sharing coupons and trading stamps constituted a distinct method of doing business justifying license taxes (p. 357). The Court pointed out that the complainants' schemes did not rest with mere advertising, with "identification and description, apprising of quality and place", where the "acquisition of the article to be sold constitutes the only inducement to its purchase" according to the "practice of old and familiar transactions", but that those schemes tempted by a promise of a value greater than the article sold and hence might be thought to be a "lure to improvidence" (p. 365). See, also, *Tanner* v. *Little,* 240 U. S. 369. In *Tax Commissioners* v. *Jackson, supra,* where a license tax with respect to chain store operation was upheld, evidence had been received and considered by the District Court, but that court did not go beyond a partial summary of the facts and general conclusions of law. We said that had Equity Rule 70½ been in force at the time of the trial, we should feel constrained to remand the case with directions to make findings of fact (p. 533); but in the circumstances the Court proceeded to summarize the proofs, and, on a full examination of the factual differences between chain

stores and individually owned units, reached the conclusion that these differences afforded a basis for the tax assailed (pp. 534-536, 541). See, also, *Liggett* v. *Lee,* 288 U. S. 518, 532.

The importance of adequate findings of fact in relation to controlling economic conditions was emphasized in *Chastleton Corporation* v. *Sinclair,* 264 U. S. 543. The suit had been brought to restrain the enforcement of an order of the Rent Commission of the District of Columbia cutting down rents for apartments. Plaintiff alleged that the emergency which had been held to justify the rent measures (sustained in *Block* v. *Hirsh,* 256 U. S. 135), had ceased. We said that the plaintiff's allegations could not "be declared offhand to be unmaintainable" and that it was not impossible "that a full development of the facts" would show them to be true, and in that case the operation of the statute would be at an end (p. 548). Before deciding the question, we found that it was "material to know the condition of Washington at different dates in the past" and that "obviously the facts should be accurately ascertained and carefully weighed." We said that this could be done more conveniently in the Supreme Court of the District than here, and, for this reason, the judgment below, dismissing the bill, was reversed and the cause was remanded for appropriate ascertainment of the facts (p. 549).

Another illustration is found in *Hammond* v. *Schappi Bus Line, supra,* involving the validity of a city ordinance regulating motor traffic in designated parts of the city's streets. The lower courts had not made findings upon crucial questions of fact. There were affidavits below, which, we said, "are silent as to some facts of legal significance; lack definiteness as to some matters; and present serious conflicts on issues of facts that may be decisive". We held that before the questions of constitutional law, both novel and of far reaching importance, were passed upon by this Court, "the facts essential to their decision should be definitely found by the lower courts upon adequate evidence". (pp. 171, 172.) Concluding that the case had not been appropriately prepared for final disposition, we remanded it for proceedings in the District Court, "with liberty, among other things, to allow amendment of the pleadings". This procedure was in accordance with well-established precedents. See *Estho* v. *Lear,* 7 Pet. 130; *Chicago, Milwaukee & St. Paul Rwy. Co.* v. *Tompkins,* 176 U. S. 167, 179; *United States* v. *Rio Grande Irrigation Co.,* 184 U. S. 416, 423; *Lincoln Gas Co.* v. *Lincoln,* 223 U. S. 349, 364.

A similar course should be taken here. While the complaint is lacking in the specific and definite allegations as to trade conditions which would be appropriate to the plaintiff's assertions in supporting its attack on the statute, we think that the plaintiff should not be refused standing in court upon the allegations made. As we do not approve the procedure adopted below, we do not pass upon the ultimate question of the constitutionality of the statute. The plaintiff should be permitted to proceed with the cause; the motion for preliminary injunction should be heard and decided, and the cause should proceed to final hearing upon pleadings and proofs; the facts should be found and conclusions of law stated as required by Equity Rule 70½.

The decree is reversed and the cause is remanded for further proceedings in conformity with this opinion.

It is so ordered.

Mr. Justice STONE and Mr. Justice CARDOZO concur in the result in the following memorandum:

We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer.

Since our brethren find that likelihood to be present in this case, and are content to postpone an adjudication of the merits, we refrain from any discussion of the validity of the statute on the basis of facts within the range of judicial notice, and assent to the judgment recommended in the opinion of the court.

A true copy.

Test:

Clerk, Supreme Court, U. S.